SUPREME COURT, U. S.

NOV 9 1967

JOHN F. DAVIS, CLERK

No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

APPENDIX

BYRD, DAVIS, EISENBERG & CLARK

DON L. DAVIS

TOM H. DAVIS

214 Austin National Bank Bldg.

Austin, Texas 78701

November, 1967

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DOCKET ENTRIES

PROCEEDINGS OF PARTIES AND ORDERS OF COURT	DATE
A. CORPORATION COURT, CITY OF AUSTIN, TEXAS	
(1) Complaint Filed	Dec. 19, 1966
(2) Judgment Entered	Dec. 20, 1966
(3) Notice of Appeal	Dec. 20, 1966
(4) Appeal Bond Filed	Dec. 21, 1966
B. COUNTY COURT AT LAW NO. 1, TRAVIS COUNTY, TEXAS	
(1) Set for Trial	March 1, 1967
(2) Motion to Quash the Complaint Filed	April 5, 1967
(3) Hearing on Motion to Quash	April 5, 1967
(4) Order Overruling Motion to Quash Filed	April 5, 1967
(5) Statement of Facts	April 5, 1967
(6) Motion for Judgment Filed	April 5, 1967
(7) Order Overruling Motion for Judgment Filed	April 5, 1967
(8) Request for Findings of Fact and Conclusions of Law Filed	April 5, 1967
(9) Findings of Fact and Conclusions of Law Filed	April 5, 1967

(10) Judgment Entered April 7, 1967

(11) Amended Motion for New Trial Filed April 7, 1967

(12) Order Overruling Amended Motion for New Trial Filed April 7, 1967

(13) Sentence Entered April 7, 1967

(14) Notice of Appeal Filed April 7, 1967

(15) Notice of Appeal to the Supreme Court of the United States Filed June 15, 1967

C. UNITED STATES SUPREME COURT

(1) Jurisdictional Statement, Transcript and Statement of Facts Filed July 21, 1967

(2) Motion to Dismiss Filed August 10, 1967

(3) Probable Jurisdiction Noted October 9, 1967

(Caption)

MOTION TO QUASH THE COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, and moves the Court to quash the complaint filed herein and as grounds therefor would show the Court as follows:

1.

The complaint charges the defendant with being drunk or being found in a state of intoxication in a public place under the provisions of Art. 477 of the Texas Penal Code.

2.

The defendant is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism.

3.

Art. 477 of the Texas Penal Code is unconstitutional because it punishes the defendant for being afflicted with the disease of chronic alcoholism which is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respect-

fully prays this Honorable Court to set this motion for hearing and that after hearing the evidence in support of said motion that the complaint filed herein against Leroy Powell be quashed as being based upon a statute which is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution.

(Subscription)

[Tr. 12]

(Caption)

ORDER OVERRULING DEFENDANT'S MOTION TO QUASH

On this day came on to be heard the motion of Leroy Powell, defendant herein, to quash the complaint of charges filed herein against him and the court having considered said motion, heard the evidence offered in support thereof and the arguments on behalf of all parties, it is ORDERED, ADJUDGED AND DECREED that the motion be in all things overruled.

To all of the above action, Leroy Powell, defendant herein, in open Court duly excepted.

Order entered this 5th day of April, 1967.

/s/----------
Jerry Dellana, Judge
County Court at Law No. 1
Travis County, Texas

[Filed under separate cover]

No. 104,234

THE STATE OF TEXAS	)(	IN THE COUNTY COURT
VS.	)(	AT LAW NO. 1
LEROY POWELL	)(	TRAVIS COUNTY, TEXAS

STATEMENT OF FACTS

Before the Honorable JERRY A. DELLANA, Judge

APPEARANCES:

MR. ROBERT O. SMITH, County Attorney of Travis County, Austin, Texas,

For the State of Texas.

MR. DON DAVIS, of the firm of Byrd, Davis, Eisenberg & Clark, Austin, Texas,

For the Defendant.

BE IT REMEMBERED that on the 5th day of April, 1967, the same being one of the regular days of the April, 1967, Term of the County Court at Law No. 1 of Travis County, Texas, came on to be heard the above entitled and numbered cause, whereon the following proceedings were had.

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WEDNESDAY, APRIL 5, 1967

3:45 P.M.

THE COURT: Are we ready to proceed on the trial of the merits?

MR. SMITH: The Defendant will come forward and be arraigned.

THE COURT: You are Leroy Powell?

THE DEFENDANT: Yes, sir.

THE COURT: In Cause No. 104,234 you are charged with being drunk in a public place. How do you wish to plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE COURT: All right, Mr. Smith.

MR. SMITH: The State of Texas, County of Travis, City of Austin. In the name and by the authority of the State of Texas, I, the undersigned affiant, do solemnly swear that I have good reason to believe, and do believe, that one Leroy Powell on or about the 19th day of December, 1966, did, before the making and filing of this complaint, within the incorporated limits of the City of Austin in Travis County, Texas, was then and there found to be in a state of intoxication in a public place that is situated, to-wit: 2000 block Hamilton, a public street therein situated. Against the peace and dignity of the State." Signed, B. Mauldin, Affiant.

"Sworn to and subscribed before me this the 19th day of December, 1966, J. C. Barnett, Jr., Notary Public, Travis County, Texas, Corporation Court, City of Austin, Texas."

THE COURT: To which complaint you plead?

THE DEFENDANT: Not guilty.

THE COURT: All right. You may proceed. Call your first witness, Mr. Smith.

STATE'S DIRECT EVIDENCE

WILLIAM R. MAULDIN,

called as a witness in behalf of the State, being duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Smith:

Q Please state your full name and address for the record, please, sir?

A William Robert Mauldin, 5207 Kings Highway, Austin.

Q And are you a police officer with the City of Austin, Travis County, Texas?

A I am.

Q How long have you been with the Police Department as an officer?

A Approximately eight months.

Q Were you so employed on or about the 19th day of December,

1966?

A I was.

Q Now, in your experience as a police officer, have you had occasion to see people in a state of intoxication?

A I have.

Q Are you familiar with the smell of alcohol and the systematic body and physical gestures that a person under the influence of alcohol has?

A I am.

Q On the 19th day of December, 1966, did you go to the 2000 block of Hamilton Street here in the City of Austin, Travis County, Texas?

A I did.

Q At that place did you observe the defendant, Leroy Powell?

A I did.

Q Is he the same person that is seated herein the courtroom behind his attorney, Mr. Davis?

A Yes, he is.

Q Did you have a chance to talk to him and observe him at that time and place?

A I did.

Q Do you have any opinion, based on your experience as a police officer, as to his state of intoxication or non-intoxication at that time and place?

A Yes, he was very intoxicated.

Q Did he have the smell of alcoholic beverages on his breath?

A He smelled strongly of alcohol, his speech was slurred and he staggered when he walked.

Q Was the place that you saw him in the 2000 block of Hamilton Street in Austin, Travis County, Texas, a public place?

A It was.

MR. SMITH: Pass the witness.

CROSS EXAMINATION

Questions by Mr. Davis:

Q Officer Mauldin, when you arrived on the scene and found the defendant, Leroy Powell, was he engaged in any fighting?

A No, he wasn't.

Q Was he being loud or boisterous?

A No.

Q I believe you stated that he staggered when he walked?

A Yes, he did.

Q And that he smelled of alcohol?

A Yes.

Q Was there any other reason for you to believe that he was intoxicated except his condition in staggering and smelling of alcohol?

A No.

Q I take it from what you have said that he made no overt act of violence?

A No.

Q Did he resist being arrested?

A No.

Q Was he cooperative?

A Yes.

MR. DAVIS: I believe that's all. Thank you.

MR. SMITH: No further questions.

THE COURT: You may step down, Officer.

MR. SMITH: The state rests, Your Honor.

STATE RESTS.

THE COURT: Do we need to keep the officer here, or may we excuse him at this time?

MR. SMITH: That's fine.

MR. DAVIS: I have no objection.

THE COURT: All right, Mr. Davis, you may proceed.

DEFENDANT'S EVIDENCE

MR. DAVIS: The Defendant calls as its first witness Dr. David Wade.

DR. DAVID WADE, M.D.,

called as a witness in behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Davis:

Q Would you state your name, please, sir?

A Dr. David Wade.

Q What is your address, sir?

A My home address is 2007 Balcones Drive here in Austin. My office is located at No. 3B Medical Arts Square.

Q Doctor, do you hold a Bachelor's Degree?

A I do.

Q Where was that obtained?

A At the University of Arkansas.

Q And what type of degree is that?

A It is a degree in Biological Sciences.

Q How many years of study did that require, Doctor?

A Four years.

Q Doctor, do you hold an M.D. Degree?

A I do.

Q Where was that obtained, sir?

A At the University of Arkansas.

Q How many years of study did that require?

A Four years.

Q Following your M.D. Degree, Doctor, did you take an internship.

A I did.

Q And where was that taken?

A. At St. Vincent's Infirmary, Little Rock, Arkansas.

Q How many years was that?

A One year.

Q What type of internship was that, Doctor?

A A general rotating internship.

Q Following that have you taken any advanced training?

A I have.

Q What is that, sir?

A I took three years psychiatric residency at the University of Texas Medical Branch at Galveston in the Galveston State Psychopathic Hospital.

Q Would you give me a description of that medical specialty?

A The specialty of psychiatry involves the diagnosis and treatment of mental and nervous disorders.

Q All right, sir. Are there American Board certification requirements for obtaining that distinction, sir?

A An individual, after completing a residency of not less than three years and having two years additional experience may apply to the American Board of Neurology and Psychiatry for certification.

Q And are you certified on that basis?

A I am.

Q Is that an honorary certification or is that an earned certification?

A That is an earned certification. You take an examination that is conducted by the American Board of Psychiatry to determine your qualifications and the extent of your knowledge; and if you pass this, you are certified.

Q All right. Are you licensed to practice in Texas, Doctor?

A I am.

Q And is your license on file?

A It is, in Travis County.

Q Doctor, what hospitals are you affiliated with?

A I am affiliated with St. Jude's Oak Ridge Hospital which is a private psychiatric hospital. I am the Chief of Staff at that hospital. I am on the staffs of Seton Hospital, St. David's Hospital, Brackenridge Hospital and Holy Cross Hospital, all here in Austin. In addition, I am the psychiatric consultant to the Veterans Administration Hospital in Kerrville, and I am on the consulting staff at the Austin State Hospital.

Q Briefly describe what type of hospital St. Jude's Oak Ridge Hospital is, please, sir?

A It is a private hospital for the care and treatment of all types of nervous and mental disorders.

Q All right, sir. Does that hospital take patients who are alcoholics?

A It does.

Q Approximately what percentage would you say the hospital devotes of its time to the treatment of alcoholics?

A Approximately ten per cent of the beds at St. Jude's Hospital are occupied by individuals with drinking problems, problems of alcoholism.

Q Doctor, are you not also, or were you not also, cofounder of a branch of the Yale School for Alcoholic Study at Texas Christian University?

A I was.

Q I believe you were also former chief-of-staff at the Austin State Hospital, weren't you?

A No. I have been superintendent of two of the State institutions, but I was never on the active staff at Austin State Hospital.

Q All right, sir. Are you a member of the American Medical Association?

A I am. I am a fellow in the American Medical Association.

Q And in the Texas Medical Association?

A I am.

Q Have you ever held any offices in either of those organizations?

A I have been president of the Texas Medical Association,

and I was on the Board of Counselors of the Texas Medical Association for a term of nine years.

Q Have you ever been associated with the Austin Council on Alcoholism?

A I have. A number of years ago I was a member of this council.

Q Do you participate in lecturing and authoring on the subject of alcoholism?

A I do, quite frequently.

Q Have you traveled to various institutions to observe new treatment techniques on alcoholism?

A I have.

Q How many years of practical experience have you had, Doctor, in the treatment of alcoholics?

A I started in the field of psychiatry in 1939 in my residency, and I have continued in this field since that time; and I have been especially interested in the problem of alcoholism throughout the entire time that I have been in this work.

Q Doctor, could you tell me how the American Medical Association defines "alcoholics"?

A The American Medical Association has defined "alcoholics" as: "Those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental

health, their interpersonal relations, and their satisfactory social and economic functioning."

Q Would you explain the phrase, please, sir, "shows a noticeable disturbance or interference with their bodily or mental health"?

A The excessive ingestion of alcohol causes a physical and a mental deterioration if it is carried on over a number of years.

Q All right, sir. Are you acquainted with an organization known as the National Council on Alcoholism?

A I am.

Q What basically is their function?

A The National Council on Alcoholism is one of those health related organizations similar to the American Association for Tuberculosis—I believe that's the American Tuberculosis Association, the American Cancer Society, and the American Heart Association. They are private organizations made up of laymen and physicians who have a special interest in the study of all phases of the disease of alcoholism.

Q All right, sir. How does the National Council on Alcoholism define the term "chronic alcoholic"?

A This association has adopted a definition which goes as follows: "A person who is an alcoholic is a person who is powerless to stop drinking and whose drinking seriously

alters his normal living pattern."

Q Would you explain that definition briefly for us, please, sir?

A This takes into account the fact that the individual who is afflicted with this disease has a compulsion to drink and he is unable to defy this compulsion. When he is seized with a compulsion to drink, he will go to all ends to attempt to get alcohol to drink. It also takes into account that the excessive and long-time ingestion of alcohol does alter his normal living patterns, both mentally and physically.

Q Doctor, can the ingestion of alcohol then be addicting?

A The medical profession kicks around the definition of addiction and makes a fine distinction between the words "addiction" and "habituation." There is some disagreement in the comparison as to whether alcohol as a substance has actual addicting qualities. By the use of the term "addiction," the individual is being said to have had bodily changes which require his continued use of alcohol or of the substance.

The term "habituation" as used by medicine indicates not a physical dependence on the substance but a mental dependence on the substance. There are some groups in medical circles who feel that alcohol is actually addicting, and there are other groups who insist

that it is simply habituating.

Q At any rate, I take it from what you have said that a chronic alcoholic does become an involuntary drinker?

A That is correct. He is powerless not to drink.

Q So he loses his self-control over his drinking?

A That is correct.

Q Is it correct to say that a chronic alcoholic suffers from a disease?

A It is. Alcoholism is considered as a disease.

Q Can a chronic alcoholic resist the constant, excessive consumption of alcohol?

A No.

Q Does alcohol ingestion have an effect on the nervous system and brain?

A It does.

Q What effect does it normally have?

A Its effect should be classified in two different categories. Its immediate effect is that it causes a loss of mental control and a loss of ability to test reality. The individual is said to be intoxicated. This word stems from the word "toxic" which, in medical language, means that it has in some way interfered with the normal metabolism of the body. So that the immediate effect is one of intoxication. If alcohol is consumed for a long enough period of time, the individual develops another

acute brain condition which is known as delirium tremens in which they have hallucinatory experiences. That is, they see and hear things that are not present. They also have a tremor, a gross tremor, of their hands and body which is due to abnormal stimulation of the nerves.

After a long period of the use of alcohol, the individual develops actual brain damage that is the result of destruction of brain cells. These individuals develop mental symptoms which are permanent and irreversible. They usually consist of shallowness of the thought processes, and artificial feeling of well being that is constant but is occasionally expressed by querulousness, faulty judgment and the dilapidation in their sense of personal pride.

Q Doctor, once a person is afflicted with this disease of chronic alcoholism, would his appearance in public in a state of intoxication be voluntary or involuntary on his part?

A This would be an involuntary thing on his part.

Q All right. Would such a public appearance be symptomatic of the disease of chronic alcoholism?

A It could be.

Q In fact, Doctor, from what you have said, I believe the disease of chronic alcoholism manifests itself as a disorder of behavior at times, does it not?

A The ingestion of alcohol does alter the individual's ability to control his behavior. He loses his sense of values and his sense of judgment and would frequently, because of this, exhibit himself in public, whereas if he were not an alcoholic or not so afflicted, his judgment would be such that he would be willing to stay, would prefer to stay, at home.

Q All right, sir. Can a chronic alcoholic be medically treated and returned to society as a useful citizen?

A We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink.

Q Doctor, does the American Medical Association consider the problem of chronic alcoholism to be one of national public concern?

A The American Medical Association does so consider alcoholism.

Q Doctor, in 1966 did the American Medical Association's House of Delegates adopt certain recommendations with regard to the hospitalization of alcoholics?

A Yes, in 1956 they did.

Q I believe it was '66, wasn't it, 1966?

A Perhaps so. Yes, they adopted them on two occasions, in 1956 and again in 1966.

Q Yes. Doctor, why were these recommendations made in 1966?

A These recommendations were made, according to the statement of the American Medical Association, and I quote from their statement, "because alcoholism is a disease that merits the serious concern of all members of the health professions."

Q Doctor, what were these recommendations?

A The recommendations were as follows:

"1. That state and county medical societies establish liaison and work with hospital medical staffs and with state and local hospital associations to implement the statement that was made in 1956.

"2. That the 1956 statement be submitted to the Joint Commission on Accreditation of Hospitals with the request that it give all possible assistance in implementing the statement.

"3. That in those hospitals which do not admit patients with the diagnosis of alcoholism, the governing board, administration and medical staff consider feasible means for providing for such admissions.

"4. That in those hospitals not admitting such patients, hospital medical staffs be encouraged to review in the past year the charts where alcoholism might have been an admitting factor, and that if so, the hospital medical staff and governing authorities be encouraged to take a more realistic approach to the admission and handling of these patients.

"5. That insurance companies and prepayment plans be encouraged to remove unrealistic limitations on the extent of coverage offered for the treatment of alcoholism, recognizing that alcoholism is a chronic illness where medical supervision may be essential."

Q Dr. Wade, have you had occasion to observe and interview the Defendant, Leroy Powell?

A I have.

Q Doctor, on that occasion did you take a history of his drinking problem?

A I did.

Q Would you give me at this time what that history was, please, sir?

A This man has a history of excessive drinking dating back to his early years. In the early years, he consumed all forms of alcohol but in later years has confined himself almost wholly to the consumption of wine and beer. He does not drink what he terms now as hard liquor.

He rarely passes a week without going on an alcoholic binge. His consumption of alcohol is limited only by his finances, and when he is broke, he makes an effort to secure alcohol by getting his friends to buy alcohol for him.

He has a pattern that is fairly typical of most alcoholics. He goes out and buys a bottle of wine with the expressed idea in his mind that this is all he is going to drink and he is going to be up and ready to go the next day, but it never proves so. By the time he has bought as much fifty-cent a bottle wine as he can afford, he is usually passed out in some joint or out on the sidewalk.

During the entire time that he has been drinking in such a manner, he has never engaged in any activity that is destructive to society or to anyone except himself. There have been no crimes of violence, no criminal acts, according to the history that he gave me other than his being in the public drunk. He has been arrested some sixty to seventy-five times, and occasionally he is able to get out. As a general rule, he is fined for being drunk in a public place and lays out his fine in jail.

During the entire time that he has had this drinking problem, this man has not received any medical

treatment or any psychiatric treatment for his drinking problem. According to the history, he has never been sent to the State Hospital nor has he been referred to Alcoholics Anonymous.

Q Doctor, based upon the history he gave you and your observation and interview with Leroy Powell, were you able to reach any conclusions?

A I was.

Q Would you give those to me, please?

A It was my conclusion that Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage.

Q In other words, he is a chronic alcoholic?

A He is a chronic alcoholic.

Q Doctor, would Leroy Powell's appearance in public in a state of intoxication be voluntary?

A No. No, by the time he has reached this point, he is not able to control his behavior, and he has reached this point because he has an uncontrollable compulsion to drink.

Q In your opinion then, I take it from what you have said, I take it that Leroy Powell does not have the willpower to resist the constant excessive consumption of alcohol?

A He does not have the willpower nor has he been given medical treatment to enable him to develop this willpower.

Q Doctor, from a medical standpoint, is a chronic alcoholic

going to be rehabilitated by simply confining him in jail without medical attention?

A No.

Q Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

A No.

Q Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?

A No.

MR. DAVIS: I believe that's all. Thank you.

CROSS EXAMINATION

Questions by Mr. Smith:

Q Dr. Wade, in the course of your examination, did you determine whether or not this man knows the difference between right and wrong?

A I feel that when he is not intoxicated he does.

Q And at the time he is not intoxicated, he knows the difference between right and wrong and is able to appreciate the nature and consequences of his act?

A I believe that is correct.

Q Now, at the time he is sober, do you think that he has a realization of the cycle that he would go through if he started drinking? In other words, one bottle of wine, two bottles of wine, three bottles of wine and then pass

out?

A No, I don't believe he has. It has been my experience that each alcoholic wakes up on the world from each drunk with the full feeling and resolution in his heart that he is going to be able to drink from now on, and they seem to believe that this time is going to be different, that they are only going to have this one or two drinks, and they are going to quit this time. I think they believe that.

Q But at the time that he takes the first drink from a sober condition, would you say that is a voluntary exercise of his will?

A Yes—I would like to answer that question, "Yes." But I would like to say that we must take into account the fact that these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded. Again, let me reiterate that the first answer is, "Yes."

Q Could you distinguish between this type of initial compulsion from that of a compulsive eater or any other type of compulsion?

A It is the same type of compulsion. There is no basic

difference between the types of compulsion.

Q But at the time the first drink is taken which brings on this chain reaction that you say he is uncontrollable, at that time the person, this defendant, would know the difference between right and wrong and be able to know and appreciate the consequences of his taking a further drink?

A He would.

MR. SMITH: I have no further questions.

REDIRECT EXAMINATION

Questions by Mr. Davis:

Q Doctor, by the same token, the defendant does not achieve a state of intoxication by one drink generally, does he?

A This is correct.

Q And it is only after the involuntary compulsion to continue drinking elapses that he achieves the state of intoxication; is that correct?

A This is correct.

MR. DAVIS: I believe that's all. Thank you.

MR. SMITH: No questions.

THE COURT: All right, Doctor, you may step down.

May we excuse the doctor at this time?

MR. DAVIS: Yes, Your Honor.

MR. SMITH: That's fine.

THE COURT: All right. Call your next witness.

MR. SMITH: The defendant calls as its next witness Lt. Nathan Darby.

DIRECT EXAMINATION

Questions by Mr. Davis:

Q Would you state your name, please?

A Lt. Nathan Darby.

Q And what is your address?

A 810 Blanco Street, Austin, Texas.

Q What is your employment?

A I am a lieutenant in charge of the Identification Section, Austin Police Department.

Q In what capacity are you employed with the Austin Police Department?

A I am lieutenant in charge of the Identification Section.

Q In your capacity as a lieutenant in charge of the Identification Section, do you have possession, custody or control of the arrest record of the defendant, Leroy Powell?

A Yes.

MR. DAVIS: Will you mark this as Defendant's Exhibit 1, please?

(Whereupon the record above referred to was identified as Defendant's Exhibit No. 1.)

Q Lt. Darby, I hand you what has been marked as Defendant's Exhibit 1. Can you identify that for me, please, sir?

A They are Xerox copies of the arrest sheets that are on file in the Identification Section of the Austin Police Department.

Q Lt. Darby, do you know offhand how many arrests are on record with the Police Department for Leroy Powell?

A I would say there are approximately seventy-three.

Q All right, sir. Now, turning your attention to the first page of the arrest sheet, it shows the arrest for December 19, 1966. What was he arrested for on that occasion?

A Drunk.

Q And the arresting officer was who?

A Mauldin.

Q I believe under the facts of the arrest it states, "This subject was in a drunken condition, smelled strongly of alcoholic beverages, staggered when walking, speech impaired." Is that correct?

A That's correct.

Q All right, sir. Now, turning your attention to page 2 of the defendant's Exhibit 1, the arrest sheet shows an arrest for November 3, 1966; is that correct?

A That's correct.

Q And what was that arrest for?

A Drunk.

Q And I believe under the facts of the arrest it states, "Observed subject down at 11th and Chicon. His speech was slurred and he smelled strongly of alcoholic beverage. He staggered when walking." Is that correct?

A Yes, correct.

Q All right. Now, again on page two of Defendant's Exhibit 1, there is an arrest of the defendant for September 27, 1966. What was that arrest for?

A Drunk.

Q And I believe under the facts of the arrest it states, "This subject was observed in a very drunken condition. Subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." Is that correct?

A That's correct.

Q All right, sir. Now turn to page 3 of the Defendant's Exhibit 1, and I note that on August 29, 1966, the defendant was again arrested; is that correct?

A Correct.

Q And what was the arrest for?

A Drunk.

Q Now, under the facts of the arrest it states, "Above subject was observed staggering in the 1200 block of Poquito. Subject smelled strongly of alcoholic beverages, eyes bloodshot and speech confused." Is that correct?

A Correct.

Q All right, sir. Now, I believe on the same page 3 there is an arrest sheet for an arrest made on August 20, 1966; is that correct?

A Yes.

Q And what was that arrest for?

A Drunk.

Q I believe under the facts of the arrests it states, "Subject asleep in the 400 block of East 6th. Subject staggered, speech blurred, smelled strongly of alcoholic beverages, eyes bloodshot and dilated." Is that correct?

A That's correct.

Q Lt. Darby, I believe that is all the arrests shown in your record here in the City of Austin for his being drunk in 1966; is that correct?

A That's correct.

Q And I believe there are five arrests for being drunk?

A Yes.

Q All right, sir. I take it, just going through these, that all the arrests shown in this Defendant's Exhibit 1 are for being drunk; is that correct?

A All for being drunk—no. That's sort of a technical question.

MR. DAVIS: Well, will you mark this, please?

(Whereupon Defendant's Exhibit No. 2 was identified by the reporter.)

Q Lt. Darby, I hand you what has been marked as Defendant's Exhibit 2. Can you identify that for me, please, sir?

A This is what we call a transcript of the record. It more or less consolidates the arrests by dates.

Q Is that a summation of the arrests as shown in Defendant's Exhibit 1?

A That's correct.

Q All right, sir. Out of the seventy-three arrests enumerated in the arrest sheet, how many arrests were made for an offense other than being drunk?

A On March 21, 1951, there was an arrest for disturbing the peace, and I would assume that the other arrests would be for drunk from all indications in looking over this transcript here.

MR. DAVIS: Your Honor, the defendant offers Defendant's Exhibits Nos. 1 and 2 into evidence.

THE COURT: Any objections?

MR. SMITH: No objection, Your Honor.

THE COURT: They will be admitted into evidence.

(Whereupon Defendant's Exhibits Nos. 1 and 2 were received in evidence, and said exhibits appear at pages —— and —— hereof.)

Q (by Mr. Davis) Lt. Darby, does the Austin Police Department have any record of the number of times Leroy Powell has been arrested for being drunk in any of the surrounding

counties?

A The answer to that question would be, "Yes."

Q Are they shown on Defendant's Exhibits 1 and 2?

A There are none shown. All are Austin arrests.

Q At any rate, based upon the information contained in Defendant's Exhibits 1 and 2, you have no record of any arrests that might have been made of Leroy Powell for being drunk in any of the surrounding counties in the State.

A None.

Q And I take it from what you have said that you wouldn't be in a position to say how many times he may have been arrested in any other county in the State?

A I didn't understand the question.

Q Excuse me. I take it from what you have said that you would not be in a position to tell me how many times Leroy Powell may have been arrested for being drunk in another county within the State of Texas?

A From the policy and procedure of the Department, there is no indication that he has ever been arrested outside of Austin, Texas.

MR. DAVIS: All right. I believe that's all.

THE COURT: Do you have any questions, Mr. Smith?

MR. SMITH: No questions.

THE COURT: You may step down. Thank you.

MR. DAVIS: I call Leroy Powell, the defendant, to testify in his own behalf.

LEROY POWELL,

the defendant, being duly sworn, testifed as follows:

DIRECT EXAMINATION

Questions by Mr. Davis:

Q Would you state your name, please, sir?

A Leroy Powell.

Q What is your address?

A 2104 East 12th, Austin.

Q Are you married?

A Yes, sir, I am.

Q Do you have any children?

A One daughter.

Q And you are the defendant in this case, are you not?

A Yes, sir.

Q What is your age?

A Sixty-six.

Q Where do you work, Mr. Powell?

A I work at 302 Congress Avenue, George Davis' Tavern.

Q What type of work do you do there?

A I shine shoes.

Q How long have you worked at George's Tavern?

A Well, I can remember about 1956 or '57.

Q You have worked there since 1956 or '57?

A Yes, sir.

Q All right, sir. Can you do heavy work?

A No, sir.

Q Why is that?

A Well, on account of I got hurt here when I was employed by the City of Austin in 1955.

Q What type of injury was that?

A I hurt my back.

Q How long have you been drinking intoxicating beverages?

A Well, let's see—I believe I started to drinking, which I did, in 1925.

Q What did you drink at the time you first started drinking?

A Wine.

Q How often do you drink?

A Well, I drinks wine every day.

Q How often do you get drunk?

A About once a week.

Q You get in a state of intoxication about once a week?

A Yes, sir.

Q Prior to this time, have you ever been arrested for being drunk?

A Do I understand you now?

Q Prior to this time, have you ever been arrested for being

drunk?

A No, sir. I've been pretty lucky, but I was drunk though. But I haven't been arrested, Do I understand you, sir?

Q I don't think you did. Have you ever been arrested before for being drunk?

A Yes, sir, many times.

Q Approximately how many times would you say?

A Oh, I guess around about a hundred times.

Q Do you usually get fined when you get arrested?

A Yes, sir.

Q What do you usually have to pay for a fine?

A Well, down in Bastrop County, it's $25.00 down there, and it's $20.00 up here.

Q What do you do when you get drunk?

A Oh, most of the time I go to sleep.

Q Where do you go to sleep?

A Well, mostly in public places, the sidewalk.

Q Do you fight?

A No, sir.

Q Do you make a loud racket?

A No, sir.

Q Do you disturb the peace?

A No, sir, I don't.

Q Or commit any acts of violence?

A No, sir.

Q Do you pretty much mind your own business?

A Yes, sir.

Q Would you like to be cured of your drinking problem?

A Yes, sir.

Q Do you have any money to pay a doctor to treat you for this problem?

A No, sir.

Q How much money do you make a week?

A Oh, right around about twelve dollars a week.

Q Do you use that money to buy groceries with?

A No, sir.

Q Do you take it home and give it to your wife to support your family?

A No, sir.

Q What do you use the money for?

A Drinking.

Q Just to buy more wine?

A Yes, sir.

Q Mr. Powell, have you ever been able to stop drinking?

A No, sir.

Q Once you take a drink, are you able to control how much liquor you consume?

A No, sir, one drink calls for another one.

Q Do you always know where you after you start drinking?

A No, sir, not all the time.

Q Do you consider yourself to be a chronic alcoholic?

A Yes, sir.

Q Have you ever been turned down for a job because of your drinking problem?

A Yes, sir.

Q Can you remember any specific places?

A Yes, sir. I had an application in for a school, for a porter, and that was one of the cause that they wouldn't take me; and then I had an application in up there at the Capitol, and that was one reason up there.

Q I take it from what you have said you made an application at the Austin Independent School District?

A Yes, sir.

Q And they found out about your drinking problem and wouldn't hire you; is that correct?

A Yes, sir.

Q And the same thing happened at the State Office Building?

A Yes, sir.

Q Do you think you could get a good job and support your family if you could lick this drinking problem you have?

A Yes, sir.

Q Have you ever stopped drinking for a period of time?

A Yes, sir, I have.

Q About how long did that last?

A Well, not too long on account of I don't have the means.

Q In other words, as soon as you get enough money, you start drinking again?

A Yes, sir.

Q Have you been arrested for being drunk during the period of time that this case has been pending this trial?

A Yes, sir.

Q Where was that?

A Bastrop.

Q And that was when?

A Oh, that was before Christmas.

Q Just before Christmas?

A Yes, sir.

Q All right. Mr. Powell, are you able to control where you go after you get in an intoxicated state?

A No, sir.

Q In other words, your appearance in public in a state of intoxication is involuntary; is that correct?

A Yes, sir.

Q If you could control your movements when you are in a state of intoxication would you go into the public?

A No, sir.

MR. DAVIS: I believe that's all.

CROSS EXAMINATION

Questions by Mr. Smith:

Q Mr. Powell, do you remember being arrested on December 19, 1966?

A No, sir, I don't.

Q Do you remember waking up in jail the morning of the 19th or 20th?

A No, sir, I don't remember.

Q You don't know anything about this incident that you are on trial for?

A No, sir.

Q Where were you at Christmas, 1966?

A Well, Judge, I just couldn't remember now. I just couldn't tell you where I was.

Q But you don't remember being arrested on the 19th?

A No, sir, I don't remember.

Q Do you remember when you started drinking before the 19th?

A No, sir, I don't.

Q Do you remember talking to the officer that testified here while ago about arresting you?

A No, sir, I don't remember talking to him. In fact, I don't know where he arrested me at. I probably might have been wandering somewhere.

Q You don't remember Christmas Day, 1966?

A No, sir.

Q Do you remember Christmas Eve?

A Well, I remember Christmas Eve, I believe.

Q Do you remember when you got out of jail just before Christmas Eve?

A No, sir, I can't remember.

Q You don't know how you got out of jail?

A No, sir. I think I worked my fine out. I believe that was it. I don't know, sir. I can't remember whether I paid it out or not.

Q Or whether somebody came and appealed it for you?

A No, sir.

Q You don't recall that?

A No, sir.

Q And you don't remember when you started drinking immediately prior to the 19th?

A No, sir.

Q When did you have the last drink now, Mr. Powell?

A This morning.

Q About what time?

A Well, somewhere around about eight o'clock.

Q Right after you got up?

A No, sir, while I was working.

Q After you got to work?

A Yes, sir.

Q When was the last time you had had a drink before that

eight o'clock drink?

A Well, I hadn't had nary one before yesterday.

Q You didn't have any yesterday at all?

A Yes, sir.

Q When was the last one you had yesterday?

A Well, I don't know, sir. I just had a few of them. I just can't imagine when was the last one. Of course, I had four or five, I guess.

Q And you went home last night?

A Yes, sir.

Q And you went to bed and went to sleep?

A Yes, sir.

Q And you didn't have one today until eight o'clock?

A No, sir.

Q You took that one at eight o'clock because you wanted to drink?

A Yes, sir.

Q And you knew that if you drank it, you could keep on drinking and get drunk?

A Well, I was supposed to be here on trial, and I didn't take but that one drink.

Q You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

A Yes, sir, that's right.

Q So you exercised your will power and kept from drinking anything today except that one drink?

A Yes, sir, that's right.

Q Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

A Yes, sir.

Q And you didn't want that to happen to you today?

A No, sir.

Q Not today?

A No, sir.

Q So you only had one drink today?

A Yes, sir.

MR. SMITH: I have no further questions, Your Honor.

REDIRECT EXAMINATION

Questions by Mr. Davis:

Q Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

A Well, that was just give to me.

Q In other words, you didn't have any money with which you could buy any drinks yourself?

A No, sir, that was give to me.

Q And that's really what controlled the amount you drank

this morning, isn't it?

A Yes, sir.

Q Leroy, when you start drinking, do you have any control over how many drinks you can take?

A No, sir.

MR. DAVIS: I believe that's all.

MR. SMITH: I have no further questions.

THE COURT: All right. You may step down, Mr. Powell.

MR. DAVIS: Your Honor, the defendant rests, and at this time would like to make a motion for judgment.

DEFENDANT RESTS.

MR. SMITH: The State rests and closes, Your Honor.

MR. DAVIS: Defendant closes, Your Honor.

EVIDENCE CLOSED.

MR. DAVIS: Comes now Leroy Powell, defendant in this case, at the close of the evidence presented against him by the State and at the conclusion of the evidence offered in his defense, but prior to announcement or entry of judgment by the Court, and moves the Court to find and enter judgment that Leroy Powell is not guilty of the offense with which he is charged, and as grounds therefor would show the Court as follows:

Defendant stands charged with being drunk or be-

ing found in a state of intoxication in a public place under the provisions of Article 477 of the Texas Penal Code. Defendant's defense to this charge is based upon the Eighth Amendment to the United States Constitution which is made applicable to the State of Texas under the due process clause of the Fourteenth Amendment of the United States Constitution and which bars the infliction of cruel and unusual punishment.

The defendant has proven that he is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant excessive consumption of alcohol, and that his appearance in public in that condition is not of his own volition but a compulsion symptomatic of the disease of chronic alcoholism; and to stigmatize him as a criminal for this act is cruel and unusual punishment in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

For all these reasons, the Defendant respectfully prays this Honorable Court to find and enter judgment that he is not guilty of the offense with which he is charged.

MR. SMITH: Your Honor, we have shown by the testimony of Dr. Wade that the man is legally sane and

knows the difference between right and wrong. We have proved by the defendant himself that he has the power to resist the first drink, and he knows the consequences of taking the first drink; and it is clear to the Court that he drinks now because he wants to drink. He can refrain from it when he comes to Court although he had rather be in a state of intoxication at other times.

We ask the Court to find the defendant guilty under the evidence before the Court and assess his punishment at at least $100.00.

THE COURT: Mr. Davis, I overrule your motion for judgment, and I find the defendant guilty and assess his punishment at a fifty dollar fine plus costs.

MR. DAVIS: Please note our exception.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Janice M. Richards, Official Court Reporter for the County Court at Law No. 1 of Travis County, Texas, do hereby certify that the above and foregoing 42 pages constitute a full, true and correct transcript in Question and Answer form of all the evidence admitted and proceedings had in a hearing on Cause No. 104,234, styled The State of Texas vs. Leroy Powell, in the County Court at Law No. 1 of Travis County, Texas.

I further certify that the foregoing Statement of Facts, contains all objections to the admission or exclusion of evidence, the rulings of the Court thereon, and the exception reserved thereto.

Witness my hand this the 21st day of April, 1967.

Janice M. Richards
Official Court Reporter
County Court at Law No. 1
Travis County, Texas

AGREEMENT OF COUNSEL

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

We, the undersigned attorneys of record in Cause No. 104,234, styled The State of Texas vs. Leroy Powell, in the County Court at Law No. 1 of Travis County, Texas, do hereby agree that the foregoing 43 pages constitute a full, true, and correct transcript in Question and Answer form of all the testimony and proceedings had during the trial of said cause.

We further agree that the foregoing Statement of Facts contains all objections to the admission or exclusion of evidence, the rulings of the Court thereon, and the exceptions reserved.

We further agree that this record shall be filed as the Statement of Facts and Bills of Exception (except such other and further bills as may be filed) in this cause.

Dated this the 28th day of April, 1967.

Robert O. Smith, County Attorney
Representing the State of Texas

Don L. Davis
Attorney for the Defendant

CERTIFICATE OF THE COURT

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

The above and foregoing Statement of Facts, having been examined by me and found to be correct, is hereby approved and ordered filed as a statement of facts in this cause.

Dated this the 1st day of May, 1967.

Jerry A. Dellana, Judge
County Court at Law No. 1
Travis County, Texas

SUMMARY OF DEFENDANT'S EXHIBITS 1 AND 2

AUSTIN POLICE DEPARTMENT RECORDS

YEAR	ARRESTS	FINES
1949	1	$ —0—
1952	3	36.00
1953	5	60.00
1954	3	36.00
1955	5	71.00
1956	8	136.00
1957	8	146.00
1958	6	107.00
1959	6	134.00
1960	5	112.00
1961	3	39.00
1962	6	68.00
1963	5	90.00
1964	1	17.00
1965	3	51.00
1966	5	100.00
TOTAL	73	$1,203.00*

*This figure does not reflect fines imposed by the County Court at Law in those cases which were appealed.

[Tr. 13]

(Caption)

MOTION FOR JUDGMENT

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, at the close of the evidence presented against him by the State and at the conclusion of the evidence offered in his defense, but prior to announcement or entry of judgment by the court, and moves the court to find and enter judgment that Leroy Powell is not guilty of the offense with which he is charged, and as grounds therefor would show as follows:

1.

Defendant stands charged with being "drunk" or being "found in a state of intoxication" in a "public place" under the provisions of Art. 477 of the Texas Penal Code.

2.

Defendant's defense to this charge is based upon the Eighth Amendment to the United States Constitution which is made applicable to the State of Texas under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and which bars the infliction of "cruel and unusual" punishment.

3.

The defendant is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism and to stigmatize him

as a criminal for this act is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respectfully prays this Honorable Court to find and enter judgment that Leroy Powell is not guilty of the offense with which he is charged.

(Subscription)

[Tr. 15]

(Caption)

ORDER OVERRULING DEFENDANT'S MOTION FOR JUDGMENT

On this day came on to be heard, at the conclusion of the evidence presented against him by the State and the evidence offered in his defense but prior to announcement or entry of judgment, the Motion for Judgment of Leroy Powell, defendant herein, that he be found not guilty of the offense with which he stands charged. The Court having considered said motion and the arguments on behalf of all parties, it is ORDERED, ADJUDGED AND DECREED that the motion be in all things overruled, to which action the defendant duly excepted.

Order entered this 5th day of April, 1967.

/s/----------
Jerry Dellana, Judge
County Court at Law No. 1
Travis County, Texas

[Tr. 17]

(Caption)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In compliance with the request of Leroy Powell, defendant herein, the Court hereby files the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.

CONCLUSIONS OF LAW

1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code.

Signed and Entered this 5th day of April, 1967.

JERRY DELLANA, Judge
County Court at Law No. 1
Travis County, Texas

[Tr. 19]

(Caption)

JUDGMENT

On the 5th day of April, 1967, this cause was called for trial and both parties appeared and the defendant, Leroy Powell, being represented by his attorney, Don L. Davis, announced ready for trial, and the defendant, Leroy Powell, pleaded not guilty to the information herein and waived trial by jury, and submitted the decision of the cause to the court. The court having heard the information herein read, and the defendant's plea of not guilty thereto and the evidence adduced, finds that the said defendant is GUILTY of the offense charged in the information.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Leroy Powell, is GUILTY of the offense of being in a state of intoxication in a public place, and the Court having heard evidence on the question of punishment, fixed the punishment by payment of a fine in the amount of Fifty and no/100 ($50.00) Dollars, for which let execution issue, and the defendant is remanded to jail to await the further orders of the court, to all of which action the defendant in open court duly excepted.

Ordered Entered this 7th day of April, 1967.

JERRY DELLANA, Judge
County Court at Law No. 1
Travis County, Texas

[Tr. 20]

(Caption)

AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, and requests leave to file this his Amended Motion for New Trial, and moves the court to set aside the judgment herein entered against him on the 5th day of April, 1967, and grant him a new trial and as grounds therefor would show the court as follows:

1.

The defendant is a citizen of the United States.

2.

The Court has made and filed herein the following findings of fact:

"1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

3.

The defendant has been found guilty of the offense of being drunk or being found in a state of intoxication in a public place under the provisions of Art. 477 of the Texas Penal Code.

4.

The trial court erred in finding and entering judgment herein that the defendant was guilty because the defendant is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol, the defendant's appearance in a public place in a state of intoxication was not of his own volition, but was a compulsion symptomatic of the disease of chronic alcoholism and to stigmatize him as a criminal for this act is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respectfully prays this Honorable Court to set aside the judgment herein and grant him a new trial.

(Subscription)

[Tr. 22]

(Caption)

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

On this day came on to be heard the amended motion for new trial of Leroy Powell, defendant herein, requesting the Court to set aside the judgment herein rendered against him on the 5th day of April, 1967, and grant him a new trial. The Court having granted leave to file said motion and having considered said motion and the arguments on behalf of all parties, it is ORDERED, ADJUDGED AND DECREED that the motion be in all things OVERRULED, to which action the defendant in open Court duly excepted and gave notice of appeal.

Order Entered this 7th day of April, 1967.

/s/----------
Jerry Dellana, Judge
County Court at Law No. 1
Travis County, Texas

[Tr. 23]

(Caption)

SENTENCE

On this the 7th day of April, 1967, this cause being again called, the State appeared by her County Attorney and the defendant, Leroy Powell, appeared in person and by his attorney, Don L. Davis, for the purpose of having the sentence of the law pronounced against him in accordance with the findings of the Court heretofore entered in this cause. Wherefore, the Court proceeded, in the presence of the said defendant, to pronounce sentence against him as follows:

It is the ORDER of this Court that the said defendant, Leroy Powell, who has been adjudged guilty of the offense of being in a state of intoxication in a public place be and is hereby sentenced to pay a fine of Fifty and no/100 ($50.00) Dollars, to which action the defendant in open court duly excepted.

Entered this the 7th day of April, 1967.

/s/----------
Jerry Dellana, Judge
County Court at Law No. 1
Travis County, Texas

[Tr. 25]

(Caption)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Leroy Powell, defendant in the above styled and numbered cause, hereby appeals to the Supreme Court of the United States from the final judgment of the County Court at Law No. 1 of Travis County, Texas, entered herein on April 7, 1967.

This appeal is taken pursuant to 28 U.S. Code, § 1257(2).

Appellant was convicted of the offense of being in a state of intoxication in a public place, in violation of Art. 477, Texas Penal Code; was sentenced to pay a fine of $50.00; and is presently enlarged on bail pending final disposition of this appeal.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint
2. Motion to Proceed In Forma Pauperis
3. Order Granting Motion to Proceed In Forma Pauperis
4. Application for Appointment of Shorthand Reporter
5. Order Appointing Shorthand Reporter
6. Motion to Quash the Complaint
7. Order Overruling Defendant's Motion to Quash
8. Motion for Judgment

9. Order Overruling Defendant's Motion for Judgment
10. Request for Findings of Fact and Conclusions of Law
11. Findings of Fact and Conclusions of Law
12. Judgment
13. Amended Motion for New Trial
14. Order Overruling Defendant's Amended Motion for New Trial
15. Sentence
16. Statement of Facts (Under Separate Covers):
    (A) Hearing on Motion to Quash Complaint
    (B) Trial on the Merits
17. Notice of Appeal
18. This Notice of Appeal to the Supreme Court of the United States
19. Clerk's Certificate

III. The following question is presented by this appeal:

Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution.

(Subscription and proof of service)

AGREEMENT AS TO APPENDIX

The parties hereby stipulate and agree that the foregoing 60 pages shall constitute the contents of the APPENDIX to be filed in the above-entitled and numbered cause.

BYRD, DAVIS, EISENBERG & CLARK

DON L. DAVIS

TOM H. DAVIS

214 Austin National Bank Bldg.

Austin, Texas 78701

By ----------

Attorneys for Appellant

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN

First Assistant Attorney General

Box "R," Capitol Station

Austin, Texas 78711

By ----------

Attorneys for Appellee

SUPREME COURT, U. S.

FILED

JUL 21 1967

JOHN F. DAVIS, CLERK

No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

JURISDICTIONAL STATEMENT

BYRD, DAVIS, EISENBERG & CLARK
DON L. DAVIS
214 Austin National Bank Bldg.
Austin, Texas 78701

LAWRENCE SPEISER
1424 16th Street, N.W.
Washington, D. C. 20036

July, 1967

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13 Howard L. J. 203 (1967) 11

12 S. Dak. L. Rev. 142 (1967) 11

19 Ala. L. Rev. 183 (1966) 11

46 B. U. L. Rev. 409 (1966) 11

15 Catholic U. L. Rev. 259 (1966) 11

54 Geo. L. J. 1422 (1966) 11

55 Ky. L. J. 201 (1966) 11

44 N.C. L. Rev. 818 (1966) 11

3 Tulsa L. J. 175 (1966) 11

11 Vill. L. Rev. 861 (1966) 11

23 Wash. & Lee L. Rev. 402 (1966) 11

7 Wm. & Mary L. Rev. 394 (1966) 11

2 Ga. St. Bar J. 239 (1965) 11

REPORTS:

President's Commission on Crime in the District of Columbia, Report (1967) [cited as *D.C. Crime Commission Report*] 12, 13

President's Commission on Law Enforcement and Administration of Justice, Report (1967) [cited as *U.S. Crime Commission Report*] 12

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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JURISDICTIONAL STATEMENT

COMES NOW, appellant, Leroy Powell, appealing from the final judgment of the County Court at Law No. 1 of Travis County, Texas, entered on April 7, 1967, convicting appellant of the offense of being in a state of intoxication in a public place, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

Opinions Below

There was no formal opinion of the County Court. The oral decision is contained in the trial transcript[1]

[1] The certified transcript is hereinafter abbreviated "Tr.," followed by the page reference.

at page 42 of the Statement of Facts.* The final Judgment and the trial court's Findings of Fact and Conclusions of Law are reproduced in Appendix A to this Statement. Appellant's Motion to Quash the Complaint, Motion for Judgment and Amended Motion for New Trial are reproduced in Appendix B to this Statement.

Jurisdiction

On April 5, 1967, in the County Court at Law No. 1 of Travis County, Texas, appellant was tried and found guilty of the offense of being in a state of intoxication in a public place in violation of Art. 477, Texas Penal Code (*infra,* p. 4). On April 7, 1967, the final Judgment was entered and appellant's Amended Motion for New Trial was overruled. (Tr. 19, 22). Notice of Appeal to the Supreme Court of the United States was filed on June 15, 1967, in the County Court at Law No. 1 of Travis County, Texas (Tr. 25). Appellant's defense, properly raised by Motion to Quash the Complaint (Tr. 10), Motion for Judgment (Tr. 13), and Amended Motion for New Trial (Tr. 20), was that because he was a chronic alcoholic, to stigmatize appellant as a criminal under Art. 477, Texas Penal Code, was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

No review of the substantial federal question presented in this case is available in any higher Texas court. In Texas, final appellate jurisdiction of criminal cases tried in the county courts at law is vested

*The Statement of Facts, although a part of the trial transcript, is submitted under separate cover and hereinafter is abbreviated "S.F.," followed by the page reference.

in the Court of Criminal Appeals. However, Article 4.03, Texas Code of Criminal Procedure (*infra,* p. 4) provides that when a case has been appealed from an inferior court to the county court at law, the Court of Criminal Appeals shall not have appellate jurisdiction when the fine imposed by the county court at law does not exceed one hundred dollars.

On appeal from the Corporation Court of the City of Austin, Texas, appellant was convicted in the County Court at Law No. 1 after a trial *de novo* for being intoxicated in a public place pursuant to Article 477, Texas Penal Code (*infra,* p. 4), which specifically provides that the fine for this offense shall not exceed one hundred dollars. The fine imposed on appellant was fifty dollars.

Therefore, this case involves a judgment by the highest available court of a State in a case in which the validity of a State statute was drawn in question as being repugnant to the Constitution of the United States and the decision was in favor of its validity. Under these circumstances, jurisdiction to review the judgment of the County Court by appeal is conferred on this Court by 28 U.S.C. § 1257 (2). It was because of this same finality of judgment in the County Court of Lamar County, Texas, that this Court had appellate jurisdiction in *Largent v. Texas,* 318 U.S. 418 (1943). Jurisdiction is further sustained by the following decisions: *Robinson v. California,* 370 U.S. 660 (1962); *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

Constitutional Provisions and Statutes Involved

Constitutional Provisions:

Eighth Amendment, United States Constitution:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Vernon's Penal Code, Art. 477, Vol. 1, p. 497 (1925):

> "Art. 477. Drunk in public place.
>
> Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Vernon's Code of Criminal Procedure, Art. 4.03, Vol. 1, p. 141 (1965):

> "Art. 4.03. Court of Criminal Appeals.
>
> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the

county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars."

Question Presented

The question presented by this appeal is:

Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution.

Statement

On December 19, 1966, appellant was arrested and charged with being found in a state of intoxication in a public place. (Tr. 2). He was tried, found guilty, and fined $20.00 on December 20, 1966, in the Corporation Court of the City of Austin, Texas. (Tr. 2). Appellant appealed the conviction to the County Court at Law No. 1 of Travis County, Texas, where, following a trial *de novo* on April 5, 1967, he was found guilty and fined $50.00. (Tr. 19).

Appellant's story is not atypical of the stories of many Americans who are afflicted with the disease of chronic alcoholism. At the time of his trial he was 66 years old with a history of drinking dating back to 1925. (S.F. 30, 31). He estimated he has been arrested for being drunk approximately 100 times. (S.F. 32). In Travis County alone, the records reflect 73 arrests since 1949. (Ex. 1).

Appellant drinks every day and gets drunk about once each week. (S.F. 31). He earns an average of $12.00 a week working in a tavern shining shoes. (S.F.

30, 33). Instead of using his meager earnings to purchase groceries or support his family, he uses his $12.00 of weekly earnings to purchase more liquor. (S.F. 33). Indeed, the amount of fines imposed on appellant for being drunk in 1966 exceed 20% of his total earnings. He remembers at least two jobs he has lost because of his drinking problem and readily admits that he has no control of his drinking. (S.F. 34). In fact, he was arrested for being drunk pending the appeal of this case from the Corporation Court to the County Court at Law. (S.F. 35). In short, appellant is an alcoholic who would like to be medically treated but is without sufficient financial resources to seek such help. (S.F. 33). And given the ability to choose, his appearance in public in a state of intoxication would not be voluntary. (S.F. 35).

Dr. David Wade, a nationally recognized psychiatrist, author and lecturer on alcoholism, testified on appellant's behalf. (S.F. 7). After examining and interviewing appellant, Dr. Wade diagnosed his condition as "chronic alcoholic." (S.F. 20). Dr. Wade stated that alcoholism is a disease which destroys the alcoholic's ability to refrain from constant, excessive consumption of alcohol. (S.F. 14). Dr. Wade further stated that once a person is afflicted with the disease of alcoholism, his appearance in public in a state of intoxication would not only be involuntary on his part, but is symptomatic of the disease of chronic alcoholism. (S.F. 15).

With regard to the specific conduct of the appellant, Dr. Wade stated that he does not have the will power to resist the constant, excessive consumption of alco-

hol and that his appearance in public in a state of intoxication is involuntary. (S.F. 20).

Based upon the uncontradicted testimony presented on appellant's behalf, the trial judge entered the following Findings of Fact:

> "1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> 2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> 3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." (Tr. 17)

By Motion to Quash the Complaint (Tr. 10), Motion for Judgment (Tr. 13) and Amended Motion for New Trial (Tr. 20), appellant unsuccessfully contended that his conviction for being in a state of intoxication in a public place was barred by the cruel and unusual punishment clause of the Eighth Amendment, as made applicable to the States by the Fourteenth Amendment. The trial judge rejected this contention and entered the following Conclusion of Law:

> "1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (Tr. 17).

The Question Is Substantial

This appeal squarely presents an important constitutional question not previously considered or decided by this Court. The County Court at Law No. 1 of Travis County, Texas, has held that the Eighth Amendment does not preclude the State from criminally punishing the involuntary consequences of being afflicted with a disease.

Appellant's contention is limited to the situation presented by this appeal, where the defendant is afflicted with the disease of chronic alcoholism which destroys his will power to resist the constant, excessive consumption of alcohol and his appearance in public in a state of intoxication is not of his own volition. Appellant submits that any statute which criminally punishes the afflicted person for conduct over which he has no control is unconstitutional in violation of the Eighth Amendment's mandate prohibiting the infliction of cruel and unusual punishment.

The decision below squarely conflicts with two recent decisions by United States Courts of Appeals. The Court of Appeals for the Fourth Circuit and four of the eight judges of the Court of Appeals for the District of Columbia Circuit have held it is cruel and unusual punishment—forbidden by the Eighth and Fourteenth Amendments—to criminally punish a chronic alcoholic for being intoxicated in a public place.

In *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), the court squarely sustained the contention now presented to this Court. In *Driver* the court stated:

> "This addiction—chronic alcoholism—is now almost universally accepted medically as a disease.

> The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine." 356 F.2d at 764.

The court concluded its analysis that a State could not constitutionally inflict punishment for an illness as follows:

> "*Robinson v. State of California,* supra, 370 U.S. 660, 82 S.Ct. 1417 (1962), sustains, if not commands, the view we take. While occupied only with a State statute declaring drug addiction a misdemeanor, the Court in the concurrences and dissents, as well as in the majority opinion, enunciated a doctrine encompassing the present case. The California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari ratione, the *Robinson* decision condemns the North Carolina law when applied to one in the circumstances of appellant Driver. All of the opinions recognize the inefficacy of such a statute when it is enforced to make involuntary deportment a crime." 356 F.2d at 764-765.

In *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966), the Court of Appeals sitting *en banc,* held that a chronic alcoholic cannot be convicted for being drunk in public because his disease has destroyed his capacity to remain sober. Four of the judges rested

their holding primarily on a 1947 Congressional Act which defined "chronic alcoholic" as a person who, *inter alia,* "has lost the power of self control with respect to the use" of alcoholic beverages. However, four judges adopted a broader ground of decision:

> "Our decision would be the same were we without the guidance furnished by the Act of 1947. One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public. . . ." 361 F.2d at 53.

The court, discussing the applicability of *Robinson v. California, supra,* noted:

> ". . . Since, as we have seen, public intoxication of a chronic alcoholic is not a crime, to convict one of it as though it were would also be cruel and unusual punishment. . . ." 361 F.2d at 54-55.

Relying on the precedential authority of *Driver, supra,* the court held:

> ". . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment." 361 F.2d at 55.

The social and legal importance of the *Driver* and *Easter* decisions have been recognized with a wealth of commentary. See: Judice, *Public Intoxication,* 30 Tex. Bar J. 341 (1967); Murtagh, *Arrests for Public Intoxication,* 35 Fordham L. Rev. 1, 7-13 (1966); New York State Bar Ass'n. Committee on Public Health, *Report on Alcoholism* (Dec. 31, 1966); Note, *Alcoholism, Public Intoxication and the Law,* 2 Colum. J. of L. & Soc. Prob. 109 (1966); Note, *Cruel and Unusual Punishment — Alcoholism as a Defense to a*

Charge of Public Intoxication, 41 Tulane L. Rev. 140 (1966); Note, 1966 Duke L. J. 545 (1966); Comment, 4 Houston L. Rev. 276 (1966); Comment, 18 S.C. L. Rev. 504 (1966); Note, 12 Wayne L. Rev. 879 (1966); Note, 52 Cornell L. Q. 470 (1967); Note, 27 La. L. Rev. 340 (1967); 33 Brooklyn L. Rev. 324 (1967); 8 Ariz. L. Rev. 351 (1967); 12 S. Dak. L. Rev. 142 (1967); 46 B.U. L. Rev. 409 (1966); 15 Catholic U. L. Rev. 259 (1966); 54 Geo. L. J. 1422 (1966); 55 Ky. L. J. 201 (1966); 44 N.C. L. Rev. 818 (1966); 3 Tulsa L. J. 175 (1966); 11 Vill. L. Rev. 861 (1966); 23 Wash. & Lee L. Rev. 402 (1966); 7 Wm. & Mary L. Rev. 394 (1966); 13 Howard L. J. 203 (1967); 19 Ala. L. Rev. 183 (1966); and 2 Ga. St. Bar J. 239 (1965).

The statutes involved in the *Driver* and *Easter* cases are substantially indistinguishable from Art. 477, Texas Penal Code. The conduct prohibited was the same: being intoxicated in a public place. If the Eighth Amendment protects chronic alcoholics against conviction for public intoxication in the Fourth and District of Columbia Circuits, so also it should reach chronic alcoholics in Texas.

The President of the Texas Association of Municipal Judges, Judge Judice of Houston, Texas, has recently reported on a study of treatment given chronic alcoholics in the Houston Corporation Courts. In this report the magnitude of the alcoholic problems in Houston, Texas, alone was pointed out by resorting to the following statistics.

> "Of the 61,985 arrests made by the Houston Police Department in 1966, 26,453 were for public intoxication. Of these 26,453 arrests, approximately 65% to 70% were made among the bottom

10% of the alcoholic community—the 'skid-row bum,' the 'wino,' the 'sociopathic-hobohemian'—that is, the homeless and institutionalized alcoholic. The mere number of arrests indicates that this is a problem not only for the courts, the bar, and the police, but also for the community at large." 30 Tex. Bar J. at 341-342.

The inhumanity and total futility of imposing criminal punishment on chronic alcoholics has long been recognized as a serious problem which affects every aspect of society. As recent as February, 1967, the President's Commission on Law Enforcement and Administration of Justice has stated:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U. S. Crime Commission Report* at 235. (1967).

The President's Commission on Crime in the District of Columbia reported that in 1965, 44,218 arrests were made in the District of Columbia for violations of the public intoxication law. The Commission concluded:

> "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474. (1967).
>
> "The practice of dealing with destitute public inebriates as criminals has proven to be expensive, burdensome and futile. . . .
>
> "Moreover, criminal procedures did not serve as a deterrent. . . . The resort to criminal sanctions has completely failed. Periodic commitments

to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness. . . ." Id. at 485-486.

"For these unfortunate people, simple humanity demands that we stop treating them as criminals and provide voluntary supportive service and residential facilities so that they can survive in a decent manner." Id. at 501.

The *Easter* and *Driver* decisions have resulted in similar litigation throughout the country. Cases raising chronic alcoholism as a defense to a charge of public intoxication are now pending in three State supreme courts: *Seattle v. Hill,* Washington Supreme Court, No. 39050, argued on March 28, 1967; *People v. Hoy,* Michigan Supreme Court, No. 51563; *Commonwealth v. Owens,* Middlesex Superior Court, Docket No. 74393, on certification to the Massachusetts Supreme Judicial Court. Similar cases are pending or have recently been tried in trial courts in Atlanta, Georgia; Columbus, Ohio; and St. Paul, Minnesota. Other test cases involving this issue are in various stages of preparation.

This Court declined to grant a writ of certiorari in *Budd v. California,* Calif. Sup. Ct., January 6, 1966 (unreported); *cert. denied,* 385 U.S. 909 (1966), the only similar case that has come before it. While the procedural defects in that case made it a poor case for review, the clear and complete record in the instant case provides an appropriate vehicle for considering and deciding the single constitutional issue presented, and for resolving the conflict between different jurisdictions that has arisen on this issue. Litigation will continue throughout the country until this Court resolves this issue.

Conclusion

For the foregoing reasons, the question presented by this appeal is substantial and is of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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& CLARK
DON L. DAVIS
214 Austin National Bank Bldg.
Austin, Texas 78701

By Don L. Davis

LAWRENCE SPEISER
1424 16th Street, N.W.
Washington, D. C. 20036

By_____

July, 1967

Appendix A

No. 104,234

IN THE COUNTY COURT AT LAW NO. 1
OF TRAVIS COUNTY, TEXAS

STATE OF TEXAS

vs.

LEROY POWELL

JUDGMENT

On the 5th day of April, 1967, this cause was called for trial and both parties appeared and the defendant, Leroy Powell, being represented by his attorney, Don L. Davis, announced ready for trial, and the defendant, Leroy Powell, pleaded not guilty to the information herein and waived trial by jury, and submitted the decision of the cause to the court. The court having heard the information herein read, and the defendant's plea of not guilty thereto and the evidence adduced, finds that the said defendant is GUILTY of the offense charged in the information.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Leroy Powell, is GUILTY of the offense of being in a state of intoxication in a public place, and the Court having heard evidence on the question of punishment, fixed the punishment by payment of a fine in the amount of Fifty and no/100 ($50.00) Dollars, for which let execution issue, and the defendant is remanded to jail

to await the further orders of the court, to all of which action the defendant in open court duly excepted.

Ordered Entered this 7th day of April, 1967.

JERRY DELLANA, Judge
County Court at Law No. 1
Travis County, Texas

No. 104,234

IN THE COUNTY COURT AT LAW NO. 1
OF TRAVIS COUNTY, TEXAS

STATE OF TEXAS

vs.

LEROY POWELL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In compliance with the request of Leroy Powell, defendant herein, the Court hereby files the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.

CONCLUSIONS OF LAW

1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code.

Signed and Entered this 5th day of April, 1967.

JERRY DELLANA, Judge
County Court at Law No. 1
Travis County, Texas

Appendix B

No. 104,234

IN THE COUNTY COURT AT LAW NO. 1
OF TRAVIS COUNTY, TEXAS

STATE OF TEXAS

vs.

LEROY POWELL

MOTION TO QUASH THE COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, and moves the Court to quash the complaint filed herein and as grounds therefor would show the Court as follows:

1.

The complaint charges the defendant with being drunk or being found in a state of intoxication in a public place under the provisions of Art. 477 of the Texas Penal Code.

2.

The defendant is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism.

3.

Art. 477 of the Texas Penal Code is unconstitutional because it punishes the defendant for being afflicted with the disease of chronic alcoholism which is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respectfully prays this Honorable Court to set this motion for hearing and that after hearing the evidence in support of said motion that the complaint filed herein against Leroy Powell be quashed as being based upon a statute which is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution.

BYRD, DAVIS, EISENBERG
& CLARK
Don L. Davis
214 Austin National Bank Bldg.
Austin, Texas 78701
By DON L. DAVIS

Attorneys for Defendant

No. 104,234

IN THE COUNTY COURT AT LAW NO. 1
OF TRAVIS COUNTY, TEXAS

STATE OF TEXAS

VS.

LEROY POWELL

MOTION FOR JUDGMENT

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, at the close of the evidence presented against him by the State and at the conclusion of the evidence offered in his defense, but prior to announcement or entry of judgment by the court, and moves the court to find and enter judgment that Leroy Powell is not guilty of the offense with which he is charged, and as grounds therefor would show as follows:

1.

Defendant stands charged with being "drunk" or being "found in a state of intoxication" in a "public place" under the provisions of Art. 477 of the Texas Penal Code.

2.

Defendant's defense to this charge is based upon the Eighth Amendment to the United States Constitution which is made applicable to the State of Texas under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and

which bars the infliction of "cruel and unusual" punishment.

3.

The defendant is afflicted with the disease of chronic alcholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism and to stigmatize him as a criminal for this act is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respectfully prays this Honorable Court to find and enter judgment that Leroy Powell is not guilty of the offense with which he is charged.

BYRD, DAVIS, EISENBERG
& CLARK
Don L. Davis
214 Austin National Bank Bldg.
Austin, Texas 78701
By DON L. DAVIS
Attorneys for Defendant

No. 104,234

IN THE COUNTY COURT AT LAW NO. 1
OF TRAVIS COUNTY, TEXAS

STATE OF TEXAS

VS.

LEROY POWELL

AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Leroy Powell, defendant in the above entitled and numbered cause, and requests leave to file this his Amended Motion for New Trial, and moves the court to set aside the judgment herein entered against him on the 5th day of April, 1967, and grant him a new trial and as grounds therefor would show the court as follows:

1.

The defendant is a citizen of the United States.

2.

The Court has made and filed herein the following findings of fact:

"1. That chronic alcoholism is a disease which destroys the afflicted person's will power to

resist the constant, excessive consumption of alcohol.

2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

3.

The defendant has been found guilty of the offense of being drunk or being found in a state of intoxication in a public place under the provisions of Art. 477 of the Texas Penal Code.

4.

The trial court erred in finding and entering judgment herein that the defendant was guilty because the defendant is afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol, the defendant's appearance in a public place in a state of intoxication was not of his own volition, but was a compulsion symptomatic of the disease of chronic alcoholism and to stigmatize him as a criminal for this act is "cruel and unusual punishment" in violation of the rights and privileges guaranteed the defendant by the Eighth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, premises considered, defendant respectfully prays this Honorable Court to set aside the judgment herein and grant him a new trial.

BYRD, DAVIS, EISENBERG
& CLARK
Don L. Davis
214 Austin National Bank Bldg.
Austin, Texas 78701

By DON L. DAVIS

Attorneys for Defendant

AUG 10 1967

JOHN F. DAVIS, CLERK

NO. 405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS

CRAWFORD C. MARTIN
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NO. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS

Appellee, the State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves that the above cause be dismissed on the grounds that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the Statutes and Rules governing appeals to this Court and does not present a substantial federal question.

STATEMENT

This is an appeal from a final judgment of the County Court at Law, No. 1, of Travis County, Texas, entered on April 7, 1967, in which Appellant was convicted of the offense of being in a state of intoxication in a public place, and imposing upon him as punishment therefor a fine of $50.00. The County Court at Law, No. 1, of Travis County, Texas, acquired jurisdiction of this case by way of appeal from the Corporation Court of the City of Austin, Texas. Article 4.03 of the Texas Code of Criminal Procedure limits any further appeals of cases appealed from an inferior

Court to a County Court at Law when the fine imposed by the County Court at Law does not exceed $100.00.

Appellant is enlarged upon bond pending the appeal to this Court and the question presented by the appeal is:

> "Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution."

The Statute (Art. 477, Vernon's Penal Code of Texas) under which Appellant was convicted appears as follows:

> "Art. 477. DRUNK IN A PUBLIC PLACE. Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

The Appellant at his de novo trial in the said County Court at Law No. 1, from which this appeal is taken, based his sole defense on the ground that the Appellant was a chronic alcoholic and, therefore, not amenable to the strictures of said Article 477. The Judge of said County Court at Law No. 1 refused to consider chronic alcoholism as a defense to said Article 477, even though he found the Appellant to be then and there afflicted with the disease of chronic alcoholism.

An appeal or application for writ of certiorari from the final judgment of a State Court is governed by Section 1257, Title 28, United States Code, which reads as follows:

> "§1257. State courts; appeals; certiorari. Final judgments or decrees rendered by the highest court

of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

ARGUMENT

There is no question in this case concerning the validity of a treaty or statute of the United States in which the decision is against its validity, nor is there any contention in this case drawing in question the validity of a State statute on the ground of its being repugnant to the Constitution, treaty or the laws of the United States.

Appellant relies on the case of *Largent v. Texas*, 318 U.S. 418 (1943) in his effort to establish the jurisdiction of his appeal to this Honorable Court. In the Largent case this Court struck down a municipal ordinance which left the granting or withholding of permits for the distribution of publications in the discretion of municipal officers, holding that this was admin-

istrative censorship in an extreme form and that it abridged the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment. Clearly the validity of the statute involved was in question in the Largent case, but in the case at bar, the sole question involved is the right of Appellant to assert the defense of chronic alcoholism.

In Appellant's effort to establish the substantiality of the question presented by him, he cites the cases of *Driver v. Hinnout,* 356 F.2d 761 (4th Cir. 1966), and *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966).

The Driver case was a habeas corpus appeal and the Fourth Circuit Court of Appeals held therein that the state could not stamp an unpretending chronic alcoholic as a criminal if his drunken public display was involuntary as a result of disease. The Easter case was an appeal to the District of Columbia Circuit Court of Appeals from a conviction of public intoxication and such Court held that chronic alcoholism was a defense to a charge of public intoxication and therefore, not a crime, but such holding was explained by one of the Circuit Judges of said Court as follows: "We may, in my view, summon this defense into being because we have both the authority and the duty to shape the criminal jurisprudence of the District of Columbia in accordance with civilized notions of justice. We are not like the ten other federal Courts of Appeals, whose authority over state criminal law derives only from the commands of the Constitution." Neither of the decisions in these cases attempted to construe the validity of the statute involved—they merely held that chronic alcoholism was a defense thereto.

Therefore, Appellant has not placed himself under the terms of said Section 1257, Title 28, United States Code, in order to entitle him to reach this Honorable Court by way of appeal or certiorari, because the only question raised by Appellant does not form a basis for an Appeal to this Court.

Appellant attempts to draw in question the validity of said Article 477 of the Texas Penal Code making it an offense for *any* person to appear in a public place or private house not his own in a state of intoxication but his only argument presented therefor is that one class of persons is exempt from the rigors of said Article, i.e., chronic alcoholics. In other words, he is complaining of the action of the trial judge in not accepting his defense to a charge of violating Article 477.

Appellant's contentions seems to be that chronic alcoholism, being a disease, destroyed the will of Appellant so as to render him unable to form an intent to commit a crime or to resist his impulse to drink to excess and to appear in public intoxicated, consequently he contends that Appellant could not violate the terms of said Article 477, and, a priori, *said Article 477 of the Texas Penal Code is totally invalid.* We think this argument is on a par with one in which a person charged and convicted of murder in spite of his defense of insanity, who claimed the murder law invalid in all respects because he was convicted thereunder without a submission of his insanity defense to the jury. We would agree that such a judgment of conviction would be subject to direct and/or collateral attack in any court of proper jurisdiction, but we will not agree that it would entitle the convicted felon to have his case reviewed by this Honorable Court by way of appeal

or certiorari under the terms of said Section 1257, Title 28, United States Code.

As indicated above the sole question presented by Appellant in his jurisdictional statement is that he was not allowed the defense of chronic alcoholism to the charge of being drunk in a public place. This issue does not present a proper subject for a review by this Court by way of appeal or certiorari from a state court of last resort.

It is respectfully submitted that the appeal presents no substantial question for review by this Court and that this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Lattimore, Assistant Attorney General of the State of Texas, one of the Attorneys for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss has been served upon Mr. Don L. Davis, Attorney for Appellant, by depositing same in the United States Mail, Certified, Postage Prepaid, addressed to Mr. Davis at 214 Austin National Bank Bldg., Austin, Texas 78701, this the 2nd day of August, 1967.

R. L. Lattimore

ROBERT L. LATTIMORE
Assistant Attorney General

SUPREME COURT, U.S.

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

BRIEF FOR APPELLANT

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November, 1967

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October Term, 1967

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---

BRIEF FOR APPELLANT

OPINIONS BELOW

There was no formal opinion of the County Court at Law. The oral decision is printed in the Appendix at page 46. The final Judgment and the trial court's Findings of Fact and Conclusions of Law are printed in the Appendix at pages 53-54.

JURISDICTION

The judgment of the County Court was entered April 7, 1967. (A. 54). Notice of Appeal to the United States Supreme Court was filed in the County Court on June 15, 1967. (A. 59). The Jurisdictional Statement, Transcript and Statement of Facts were filed in the United States Supreme Court on July 21, 1967. Probable jurisdiction was noted on October 9, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (2), and is supported by *Largent v. Texas,* 318 U.S. 418 (1943), and *Robinson v. California,* 370 U.S. 660 (1962).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

Eighth Amendment, United States Constitution:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Vernon's Penal Code, Art. 477, Vol. 1, p. 497 (1925):

> "Art. 477. Drunk in public place.
>
> Whoever shall get drunk or be found in a state

of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

QUESTION PRESENTED

The question presented by this appeal is:

> Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighteenth and Fourteenth Amendments to the United States Constitution.

STATEMENT

On December 19, 1966, appellant was arrested and charged with being found in a state of intoxication in a public place. (A. 6). He was tried, found guilty, and fined $20.00 on December 20, 1966, in the Corporation Court of the City of Austin, Texas. (Tr. 2). Appellant appealed the conviction to the County Court at Law No. 1 of Travis County, Texas, where, following a trial *de novo* on April 5, 1967, he was found guilty and fined $50.00. (A. 46).

Appellant's story is typical of the stories of many indigent Americans who are afflicted with the disease of chronic alcoholism. At the time of his trial he was 66 years old with a history of drinking dating back to 1925. (A. 34, 35). He estimated he has been arrested for being drunk approximately 100 times. (A. 36). In Travis County alone, the records reflect 73 arrests since 1949. (A. 50, R. 28).

Appellant drinks every day and gets drunk about once each week (A. 35). He earns an average of $12.00 a week working in a tavern shining shoes. (A. 34, 37). Instead of using his meager earnings to purchase gro-

ceries or support his family, he uses his $12.00 of weekly earnings to purchase more liquor. (A. 37). Indeed, the total fines imposed on appellant for being drunk in 1966 exceed 20% of his total earnings. He remembers at least two jobs he has lost because of his drinking problem and readily admits that he has no control of his drinking. (A. 38). In fact, he was again arrested for being drunk pending the appeal of this case from the Corporation Court to the County Court at Law. (A. 39). In short, appellant is an alcoholic who would like to be medically treated but is without sufficient financial resources to obtain such help. (A. 37). And given the ability to choose, he would not voluntarily appear in public in a state of intoxication. (A. 39).

Dr. David Wade, a national recognized psychiatrist, author and lecturer on alcoholism, testified on appellant's behalf. (A. 11). After examining and interviewing appellant, Dr. Wade diagnosed his condition as "chronic alcoholic." (A. 24). Dr. Wade stated that alcoholism is a disease which destroys the alcoholic's ability to refrain from constant, excessive consumption of alcohol. (A. 18). Dr. Wade further stated that once a person is afflicted with the disease of alcoholism, his appearance in public in a state of intoxication would not only be involuntary on his part, but is symptomatic of the disease of chronic alcoholism. (A. 19). Dr. Wade stated that appellant does not have the will power to resist the constant, excessive consumption of alcohol and that his appearance in public in a state of intoxication is involuntary. (A. 24).

Based upon the uncontradicted testimony presented on appellant's behalf, the trial judge entered the following Findings of Fact:

"1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." (A. 53).

By Motion to Quash the Complaint (A. 1), Motion for Judgment (A. 51) and Amended Motion for New Trial (A. 55), appellant unsuccessfully contended that his conviction for being in a state of intoxication in a public place was barred by the cruel and unusual punishment clause of the Eighth Amendment, as made applicable to the States by the Fourteenth Amendment. The trial judge rejected this contention and entered the following Conclusion of Law:

"1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (A. 53).

ARGUMENT

I. APPELLANT'S CONVICTION FOR PUBLIC INTOXICATION IS UNCONSTITUTIONAL.

The County Court at Law No. 1 of Travis County has held that the Eighth Amendment does not preclude the State of Texas from criminally punishing the in-

voluntary consequences of being afflicted with the disease of chronic alcoholism.

Appellant submits that any statute which criminally punishes an ill person for conduct over which he has no control is unconstitutional in violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Appellant's contention is limited to the situation presented by this appeal, where the defendant is afflicted with the disease of chronic alcoholism which destroys his will power to resist the constant, excessive consumption of alcohol and his appearance in public in a state of intoxication is involuntary.

The history of public intoxication statutes, considered in light of medical advances which have been made in the treatment and care of chronic alcoholics, reflects the inability of the courts to deal with what is basically a medical problem. Criminal punishment for the involuntary consequences of a disease cannot withstand judicial scrutiny under the Eighth Amendment.

A. HISTORICAL BACKGROUND

Article 477, Texas Penal Code, *supra,* p. 3, is a classic example of the many public intoxication statutes in effect across the country. When applied to a chronic alcoholic, such a statute imposes criminal sanctions upon conduct which the individual has no ability to control. This traditional attitude of hostility toward alcoholism finds root as far back as biblical expressions condemning intoxication as being immoral. See, e.g. Leviticus 10:9; Proverbs 23:31-32. The Parliament of James I carried over the biblical concept that drunkenness was a moral offense in the English Intoxication Statute of 1606 declaring:

"Whereas the loathsome and odious Sin of Drunkenness is of late grown into common Use within this Realm, being the Root and Foundation of many other enormous Sins, as Bloodshed, Stabbing, Murder, Swearing, Fornication, Adultery, and such like, to the great Dishonour of God, and our Nation, the Overthrow of many good Arts and manual Trades, the Disabling of Divers Workmen, and the general Impoverishing of many good Subjects, abusively wasting the good Creatures of God . . ." 4 Jac. 1, c.5 (1606).

The English law provided for the drunk to be fined, or, if the drunk was without sufficient resources to pay his fine, he was placed in the stocks for six hours. 4 Jac. 1, c.5 (1606). Most of the public intoxication statutes in effect today continue to impose this form of punishment for drunkenness—fine and/or imprisonment[1]—with the result that the derelict chronic alcoholic invariably finds himself confined in a jail which is neither attuned to his medical needs nor properly equipped for his care.[2] This is largely the rule today in spite of the fact that responsible authorities have stated that alcoholism has perhaps the highest recovery potential of all major health problems in the United States today.[3]

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[1] See, e.g., Cal. Pen. Code §§ 647, 19; D.C. Code Ann. § 25-128 (a) (1961); Mich. Stat. Ann. § 28.365 (1962); N.C. Gen. Stat. §§ 14-335 (12) (Supp. 1965); Wisc. Stat. Ann. § 947.03 (1958).

[2] Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate*, 139 (1958):

[3] "The best medical opinion before our committee was to the effect that thirty to fifty per cent of the chronic alcoholics could be helped if alcoholism were treated as a health problem rather than a crime." Rehabilitation of Alcoholics, Hearings before the Sub-Committee on Health, Education, and Recreation, of the House Committee on the District of Columbia, 93 Cong. Rec. 3357 (1947).

The medically defined characteristics of chronic alcoholism clearly reveal that a chronic alcoholic does not appear in public in a state of intoxication of his own volition. The medical concept of alcoholism as a disease has existed for over one hundred and sixty-three years. As early as 1804 Dr. Thomas Trotter stated:

> "In medical language, I consider drunkenness, strictly speaking, to be a disease; produced by a remote cause, and giving birth to actions and movements in the living body, that disorder the functions of health." Haggard & Jellinek, *Alcohol Explored* 142 (1954), quoting from Trotter, *An Essay, Medical, Philosophical and Clinical on Drunkenness,* 179 (2d. ed. 1804).

However, the traditional approach to drunkenness as a moral defect, and the prohibition movement which culminated in the Eighteenth Amendment to the Constitution, combined to submerge consideration of alcoholism as a public health problem.[4] One author suggests that another factor in the tardy presentation of alcoholism as a disease was the fear of the "alcoholic practice" label as well as the difficulty in diagnosing and treating the alcoholic.[5]

With the failure of the prohibition movement in this country came a surge in the medical, sociological and psychological study of the alcoholic. Today alcoholism is universally accepted as a disease which requires med-

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[4]See generally, Krout, The Origins of Prohibition (1925); Ullman, To Know the Difference 3-4 (1960).

[5]Lipscomb, *Epidemiological Methods in the Study of Alcoholism,* 49 Amer. J. of Public Health 327, 328 (1959).

ical attention for its proper treatment and care.[2] In 1947, for example, Congress declared that judges in the District of Columbia should take judicial notice that alcoholism is a disease. D.C. Code Ann. § 24-501 (1961 ed.)

In 1953, Texas enacted comprehensive legislation providing for the civil commitment of alcoholics, declaring:

> "... Alcoholism is hereby recognized as an illness and a public health problem affecting the general welfare and the economy of the State. Alcoholism is further recognized as an illness subject to treatment and abatement and the sufferer of alcoholism is recognized as one worthy of treatment and rehabilitation. The need for proper and sufficient facilities, programs and procedures within the State for the control and treatment of alcoholism is hereby recognized. It is hereby declared that the procedure for commitment of alcoholics as hereinafter provided for is not punitive but is a commital for treatment of an illness affecting not only the individual involved but the public welfare as well." Vernon's Texas Civil Statutes, Art. 5561c § 1 (1953).

In 1956, the American Medical Association House of Delegates for the first time formally recognized alcoholism as a medical problem and urged that alcoholics be admitted to general hospitals.[3] In 1966, the AMA reemphasized the need for medical facilities to

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[2] Cecil and Loeb, a Textbook of Medicine, 1625 (10th ed. 1959); Jellinek, The Disease Concept of Alcoholism, 41-44 (1960); Guttmacher and Weihofen, Psychiatry and the Law, 318-322 (1952 ed.). See also: Appendix A, Brief of Amici Curiae.

[3] *Hospitalization of Patients with Alcoholism*, 762 A.M.A.J. 750 (October 20, 1956).

treat alcoholics and requested the Joint Commission on Accreditation of Hospitals to assist them in implementing the 1956 statement. (A. 21). At the present time, the AMA and related organizations are actively involved in educating the public and physicians in the problems of alcoholism.*

Intrinsic in the disease concept of alcoholism is the fact that an alcoholic does not have the ability to control his drinking. The American Medical Association defines "alcoholic" as:

> "Those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning." (A. 15).

The National Council on Alcoholism defines a "chronic alcoholic" as:

> "A person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." National Institute of Mental Health, Dept. of Health, Education and Welfare, *Alcoholism,* Public Health Service Pub. No. 730 (1963).

Congress has defined a "chronic alcoholic" as:

> "The term 'chronic alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol en-

*A.M.A., *Today's Health Guide* 459 (1965); Concerning Responsibility of Psychiatrists and other Physicians for Alcohol Problems (Feb. 1965); National Institute of Mental Health, United States Depart. of Health, Education and Welfare, *Alcoholism,* Public Health Service Pub. No. 730 (1963).

dangers the public morals, health, safety, or welfare." D.C. Code Ann. § 24-502 (1961 ed.).

The Texas Legislature has defined "alcoholic" as:

> "An 'alcoholic' means any person who chronically and habitually uses alcohol beverages to the extent that he has lost the power of self control with respect to the use of such beverages, or while chronically and habitually under the influence of alcoholic beverages endangers public morals, health, safety or welfare." Vernon's Texas Civil Statutes, Art. 5561c § 3(c) (1953).

Thus, an element common to every definition of a "chronic alcoholic" is his inability to control his use of alcohol. It is this element which many medical authorities conclude forms the basis for the disease concept of alcoholism.

> "The disease conception of alcohol addiction does not apply to the excessive drinking, but solely to the loss of control which occurs in only one group of alcoholics, and then only after many years of excessive drinking." Jellinek, *Phases of Alcohol Addiction, in Society, Culture and Drinking Patterns,* 357 (1962).

And it is this same characteristic of the disease, destruction of the alcoholic's will power to resist the constant, excessive consumption of alcohol, that forms the legal basis upon which appellant contends his public intoxication cannot be demeaned as criminal. To punish appellant—a chronic alcoholic—for publicly exhibiting a symptom of his disease is cruel and unusual punishment forbidden by the Eighth Amendment standards recognized by this Court.

B. THE EIGHTH AMENDMENT STANDARDS

From the decisions of the Supreme Court which have constued the Eighth Amendment, two basic principals have developed by which punishment asserted to be "cruel and unusual" are to be judged. First, is the principle that the substantive standards which give meaning to the Eighth Amendment are not "static" but are continually evolving with the progress of humanity. Second, the judicial inquiry in a particular case is focused on whether the punishment inflicted amounts to "barbarous," "inhumane" or "indecent" treatment.

As early as *Wilkerson v. Utah,* 99 U.S. 130 (1879), this Court recognized that boundaries could not be drawn beyond which the Eighth Amendment would not apply.

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; . . ." § 99 U.S. at 135-136.

The above passage was quoted in *In re Kemmler,* 136 U.S. 436, 447 (1890), immediately followed by the comment that "Punishments are cruel when they involve torture or a lingering death; . . ." However, in *Weems v. United States,* 217 U.S. 349 (1910), the Court was careful to point out that the statement quoted above from *In re Kemmler* "was not meant . . . to give a comprehensive definition of cruel and unusual punishment, but only to explain the application of the provision to the punishment of death." 217 U.S. at 370-371. After commenting on the history which gave birth to the Eighth Amendment, the Court concluded:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. . . ." 217 U.S. at 373.

In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court placed the basis for the Eighth Amendment's guarantee against cruel and unusual punishment in proper posture. In the opinion for the majority, Mr. Chief Justice Warran stated:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." 356 U.S. at 100.

Commenting on the earlier holding in *Weems v. United States,* Chief Justice Warran reemphasized the scope of the Eighth Amendment in the following language:

> "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*" 356 U.S. at 100-101. (Emphasis added).

History has shown that criminal law is "one of the most faithful mirrors of a given civilization, reflecting

the fundamental values on which the latter rests.'" In like manner, the decisions of the Supreme Court which have construed the Eighth Amendment reflect "the evolving standards of decency" which require that punishments inflicted be kept "within the limits of civilized standards."

That a form of punishment finds early vintage in the annals of history is irrelevant to the inquiry of whether that punishment is now considered "cruel and unusual." Mr. Justice Story concluded the prohibition was aimed at "atrocious conduct." 2 Story, *Commentaries on the Constitution of the United States,* § 1903 at 650 (5th ed. 1891). In Mr. Justice Field's well-known dissenting opinion in *O'Neil v. Vermont,* 144 U.S. 323, 364 (1892), he stated, "It is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed." All authorities agree that such barbarisms as "burning at the stake, crucifixion, breaking on the wheel" are "within the constitutional prohibition." *In re Kemmler, supra,* at 446. However, the Supreme Court early concluded the framers of the constitution had recognized "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Weems v. United States, supra,* at p. 372.

Other courts have construed the Eighth Amendment to prohibit any punishment that would "shock the sensibilities of men," "shock public sentiment and violate the judgment of reasonable men," or which "shocks a balanced sense of justice." *Jackson v. United States,* 102 Fed. 473, 488 (9th Cir. 1900); *Hayes v. United States,* 112 F.2d 417, 420 (10th Cir. 1940); *Gallego v.*

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*Donnelly, Goldstein & Schwartz, Criminal Law 524 (1962).

United States, 276 F.2d 914 (9th Cir. 1960). In *Weber v. Commonwealth,* 303 Ky. 56, 196 S.W.2d 465, 469 (1946), the Kentucky Supreme Court suggested the Eighth Amendment was intended to keep pace "with the progress of humanitarianism." In *Ex Parte Pickens,* 101 F.Supp. 285, 288 (D.C. Ala. 1951), the Court stated that "the Eighth Amendment is to be considered in the light of developing civilization," making it unnecessary "to speculate as to what might have been considered cruel and inhuman punishment in 1787."

More recently, in *Robinson v. California,* 370 U.S. 660 (1962), the Supreme Court reaffirmed that the prohibition against "cruel and unusual" punishment did not encompass merely broad "generalties of empty vagueness."[10] In *Robinson* the Court struck down a statute which made the "status" of narcotic addiction a criminal offense. Drawing upon "the light of contemporary human knowledge" the Court concluded that any law which made a criminal offense of suffering from a disease would be an infliction of cruel and unusual punishment. Mr. Justice Douglas, in his concurring opinion, stated that "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man," and agreed that the same principle which prohibited the emboweling of a person alive also prohibited "imprisonment for being sick." He concluded, "Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." 370 U.S. at 676.

Appellant submits that if the basic concept under-

[10] *Francis v. Resweber,* 329 U.S. 459 (1947), Mr. Justice Frankfurter's concurring opinion, at page 466.

lying the Eight Amendment is nothing less than the dignity of man, then, in the light of contemporary human knowledge, punishment of a chronic alcoholic for publicly exhibiting a symptom of his illness cannot bear scrutiny under the Eighth Amendment. Appellant does not question the form of punishment, but denies the authority of the State of Texas to punish him at all.

C. THE *DRIVER* AND *EASTER* CASES[11]

The Court of Appeals for the Fourth Circuit and four of the eight Judges of the Court of Appeals for the District of Columbia Circuit have held it is cruel and unusual punishment to convict a chronic alcoholic for being intoxicated in a public place.

In *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), the court squarely sustained the contention now presented to this Court. In *Driver* the court stated:

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[11]The social and legal importance of the *Driver* and *Easter* decisions have been recognized with a wealth of commentary. See: Judice, *Public Intoxication*, 30 Tex. Bar J. 341 (1967); Murtagh, *Arrests for Public Intoxication*, 35 Fordham L. Rev. 1, 7-13 (1966); New York State Bar Ass'n. Committee on Public Health, *Report on Alcoholism* (Dec. 31, 1966); Note, *Alcoholism, Public Intoxication and the Law*, 2 Colum. J. of L. & Soc. Prob. 109 (1966); Note, *Cruel and Unusual Punishment — Alcoholism as a Defense to a Charge of Public Intoxication*, 41 Tulane L. Rev. 140 (1966); Note, 1966 Duke L. J. 545 (1966); Comment, 4 Houston L. Rev. 276 (1966); Comment, 18 S.C. L. Rev. 504 (1966); Note, 12 Wayne L. Rev. 879 (1966); Note, 52 Cornell L. Q. 470 (1967); Note, 27 La. L. Rev. 340 (1967); 33 Brooklyn L. Rev. 324 (1967); 8 Ariz. L. Rev. 351 (1967); 12 S. Dak. L. Rev. 142 (1967); 46 B.U. L. Rev. 409 (1966); 15 Catholic U. L. Rev. 259 (1966); 54 Geo. L. J. 1422 (1966); 55 Ky. L. J. 201 (1966); 44 N.C. L. Rev. 818 (1966); 3 Tulsa L. J. 175 (1966); 11 Vill. L. Rev. 861 (1966); 23 Wash. & Lee L. Rev. 402 (1966); 7 Wm. & Mary L. Rev. 394 (1966); 13 Howard L. J. 203 (1967); 19 Ala. L. Rev. 183 (1966); and 2 Ga. St. Bar J. 239 (1965).

"This addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine." 356 F.2d at 764.

The court concluded its analysis that a State could not constitutionally inflict punishment for an illness as follows:

"*Robinson v. State of California, supra,* 370 U.S. 660, 82 S.Ct. 1417 (1962), sustains, if not commands, the view we take. While occupied only with a State statute declaring drug addiction a misdemeanor, the Court in the concurrences and dissents, as well as in the majority opinion, enunciated a doctrine encompassing the present case. The California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari ratione, the *Robinson* decision condemns the North Carolina law when applied to one in the circumstances of appellant Driver. All of the opinions recognize the inefficacy of such a statute when it is enforced to make involuntary deportment a crime." 356 F.2d at 764-765.

In *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966), the Court of Appeals sitting en banc, held that a chronic alcoholic cannot be convicted for being

drunk in public because his disease has destroyed his capacity to remain sober. Four of the judges rested their holding primarily on common law grounds, relying upon a 1947 Congressional Act which defined "chronic alcoholic" as a person who, *inter alia,* "has lost the power of self control with respect to the use" of alcoholic beverages." However, four judges adopted a broader ground of decision:

> "Our decision would be the same were we without the guidance furnished by the Act of 1947. One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public. . . ." 361 F.2d at 53.

The court, discussing the applicability of *Robinson v. California, supra,* noted:

> ". . . Since, as we have seen public intoxication of a chronic alcoholic is not a crime, to convict one of it as though it were would also be cruel and unusual punishment. . . ." 361 F.2d at 54-55.

Relying on the precedential authority of *Driver, supra,* the court held:

> ". . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment." 361 F.2d at 55.

The statutes involved in the *Driver* and *Easter* cases are substantially indistinguishable from Art. 477, Texas Penal Code. The conduct prohibited was the same: being intoxicated in a public place. Surely the law cannot discriminately say public intoxication is symptomatic of a disease in one part of the country

[11] D.C. Code Ann. § 24-502 (1961 ed.).

but a crime in another. If the Eighth Amendment protects chronic alcoholics against conviction for public intoxication in the Fourth and District of Columbia Circuits; so also must it reach chronic alcoholics in Texas.

The expert medical testimony of Dr. David Wade, unrebutted by the State, proved that appellant's "appearance in public in a state of intoxication" was an "involuntary" act. (A. 19, 24). Judge Dellana so found as a matter of fact. (A. 53). However, Judge Dellana erroneously concluded:

> "The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (A. 53).

Presumably, the theory behind treating appellant as a criminal is the same which calls for punishment of any criminal conduct—retribution, deterrence and rehabilitation. Once the fact that chronic alcoholism is a disease is accepted, the theory of retribution—incarcerating the offender for the wrong he has committed against society—is totally unacceptable. Our morality does not permit us to punish for illness.

The justification for deterrence, in these circumstances, is specious at best. We need look no further than the record of appellant, 73 reported arrests for public drunkenness, to see the lack of any deterrent effect from the incarceration of chronic alcoholics. "The results of our investigation negate completely the assumption that incarceration acts as a deterrent

to the chronic public inebriate." Pittman & Gordon, *supra*, footnote 2.

The objective of rehabilitation is equally inapplicable. Clearly, the criminal law does not contribute to the solution of this medical problem. This has been recognized as recently as February, 1967, when the President's Commission on Law Enforcement and Administration of Justice concluded:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U.S. Crime Commission Report* at 235. (1967).

The President's Commission on Crime in the District of Columbia reported that in 1965, 44,218 arrests were made in the District of Columbia for violations of the public intoxication law. The Commission concluded:

> "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474. (1967).
>
> "The practice of dealing with destitute public inebriates as criminals has proven to be expensive, burdensome and futile. . . .
>
> "Moreover, criminal procedures did not serve as a deterrent. . . . The resort to criminal sanctions has completely failed. Periodic commitments to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness. . . ." Id. at 485-486.
>
> "For these unfortunate people, simple humanity demands that we stop treating them as criminals

and provide voluntary supportive service and residential facilities so that they can survive in a decent manner." Id at 501.

The Citizens' Advisory Committee to the California Attorney General on Crime Prevention has concluded:

> "The thousands of alcoholics who spend most of their lives 'wearing out the jails' of their home counties are more than a nuisance to the public, more than a heavy burden on the taxpayer, more than a menace to health. They are symbols of public indifference, of governmental ineptitude.
>
> "Our method of dealing with them—the 'street cleaning operation' by which they are swept out of the doorways and alleys and gutters of our Skid Rows, to be dumped into 'drunk tanks' scarcely less filthy than the gutters, their brief contact with the court, their meaningless run around through revolving door jails, their stumbling return to Skid Row, the failure to provide humane, scientific, sustained care and treatment with effective follow-up by clinics and social agencies after their release—all this constitutes a violation of basic principles of common sense and common humanity." quoted in MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime,* 9 Crime & Delinquency 15, 17-18 1963).

The medical profession has repeatedly decried the punishment being imposed on people afflicted with the disease of chronic alcoholism." The former Chairman of the American Medical Association's Committee on Alcoholism, Dr. Marvin Block, has warned that "one cannot legislate against a disease," and emphasized

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"See the myriad of authorities quoted in *Easter v. District of Columbia,* 361 F.2d at 56-60.

"the importance of regarding alcoholism as an illness rather than a violation of the law." Block, *Alcoholism: Its Facets and Phases* 60, 283-84 (1965).

If the substantive law of the Eighth Amendment is to be drawn from "the evolving standards of decency that mark the progress of a maturing society," surely appellant's conviction, for conduct a disease has usurped his ability to control, constitutes cruel and unusual punishment "in an enlightened democracy such as ours."

II. APPELLANT'S CONVICTION FOR EXHIBITING A SYMPTOM OF HIS DISEASE IS UNCONSTITUTIONAL.

In *Robinson v. California, supra,* this Court reversed a conviction under a California statute making it a crime to be addicted to narcotics. In striking down the statute as being unconstitutional on its face, the Court stated that "in the light of contemporary human knowledge," it is cruel and unusual punishment for a state to punish illnesses and diseases.

Appellant does not here contend that Article 477, Texas Penal Code, *supra,* p. 3, is unconstitutional on its face. It may properly be applied to persons unafflicted with the disease of chronic alcoholism. In the words of Judge Bryan in the *Driver* case, "Hence we exclude the merely excessive—steady or spree—voluntary drinker.'"[14] Appellant does contend, however, that Article 477, when applied to an unpretending chronic alcoholic, is unconstitutional in that application. And the fact that Article 477 punishes a symptom of the dis-

[14] 356 F.2d at 764.

ease of chronic alcoholism—public intoxication—rather than the disease itself, affords no basis for distinguishing *Robinson.*

Prior to *Robinson,* the Eighth Amendment had been regarded as a restriction on the power of the legislature in two areas: it prohibited punishment that was inherently cruel because of its inhuman or barbarous nature, and it prohibited punishment that was grossly disproportionate to the offense for which it was imposed. In *Robinson,* the Court held that the Eighth Amendment restricts not only the state's power to prescribe punishment but also limits the power of the state to define specific conduct as being criminal.

> ". . . Rather we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' . . ." 370 U.S. at 666.

In noting the limits which the Eight Amendment places on the State's power to define crime, the Court stated:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666.

Mr. Justice Douglas, in his concurring opinion, effectively drew an analogy between drug addiction and the evils society once practiced on the insane, concluding:

> "... We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U.S. at 678.

There can be no question that if Article 477 provided that "a chronic alcoholic found in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars," the statute would be struck down as unconstitutional under *Robinson. No tenable basis exists for distinguishing this hypothetical provision from Article 477 as applied to appellant.*

In *Robinson* the Court stated that "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Would not also "one day in prison . . . be a cruel and unusual punishment for the 'crime' of" sneezing in public? It defies logic to say the Eighth Amendment prohibits punishing the status of being afflicted with a disease (chronic alcoholism) yet does not prohibit punishing the involuntary symptoms of a disease (public intoxication).

The Court of Appeals in *Driver v. Hinnant, supra,* recognized that it would violate the Eighth Amendment to punish a chronic alcoholic for those acts "which are

compulsive as symptomatic of the disease.'"[15] The Court summarized its holding by stating:

> "The upshot of our decision is that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease. . . ." 356 F.2d at 765.

In this case the trial judge found as fact that a chronic alcoholic cannot "resist the constant, excessive consumption of alcohol" and that his appearance in public is not "by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." Appellant's record of 73 arrests in Travis County alone punctuates the fact that habitual and repetitive public intoxication is the basic symptom of chronic alcoholism. Accepting this obvious truism, the Court of Appeals for the Seventh Circuit recently in *Sweeney v. United States,* 353 F.2d 10 (7th Cir. 1965), indicated that a chronic alcoholic could not be required to refrain from drinking as a condition of probation. In that case the District Court had suspended Sweeney's sentence on a Dyer Act conviction and placed him on probation with the condition he "refrain from the use of alcoholic beverages in any form, and . . . support his children to the best of his ability." Sweeney violated the condition, was arrested and began serving his original sentence. With regard to Sweeney's contention that his probation was revoked unjustly, the Court stated:

> ". . . It appears from the record that when probation was granted, the district court knew petitioner's history of chronic alcoholism, and had indications of its pathological nature. We think consequently the probation condition under the facts

[15] 356 F.2d at 764.

of this case, would be unreasonable' as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition." 353 F.2d at 11.

In footnote 2, indicated in the above quotation, the Court cited *Robinson* and said:

> ". . . the Supreme Court, in striking down a California statute which, as construed, made the 'status' of narcotic addition a criminal offense, illustrated why, on the record before us, we think the probation condition would be unreasonable: . . ." 353 F.2d at 11.

It is no less unreasonable to say that a state can not punish a person for having a disease but can punish him for involuntary conduct symptomatic of his disease.

In the trial court the State apparently sought to establish their case against appellant by establishing that "at the time the first drink was taken" appellant would "know the difference between right and wrong and would be able to know and appreciate the consequences of his taking a further drink." (A. 27; 42, 43). The State's approach was based on Article 36 of the Texas Penal Code which provides that *voluntary* intoxication is no defense to a criminal charge. The first paragraph of Article 36 reads as follows:

> "Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, or narcotics, or a combination thereof, shall constitute any excuse for the commission of crime. Evidence of temporary insanity produced, however, by such use of ardent spirits, intoxicating liquor or narcotics, or a

combination thereof, may be introduced by the defendant in mitigation of the penalty attached to the offense for which he is being tried."

Appellant does not question the authority of Article 36. Appellant says that Article 36 is inapplicable to this case because the trial court found as fact that a chronic alcoholic does not have the ability to "resist the constant, excessive consumption of alcohol." Dr. Wade was quick to point this out when he stated that not only is the compulsion to take the initial drink "an exceedingly strong influence," but that after the initial drink, appellant's appearance in public in a state of intoxication is "because he has an uncontrollable compulsion to drink." (A. 24, 25, 26). Consequently, even though the origin of appellant's alcoholism may have been a voluntary first drink, this does not mean that his subsequent drinking is voluntary.

This same "original sin" contention was advanced, and rejected, in *Easter v. District of Columbia:*

> "... [c]hronic alcoholism resulting in public intoxication cannot be held to be criminal on the theory that before the sickness became chronic there was at some earlier period a voluntary act or series of acts which led to the chronic condition. A sick person is a sick person though he expose himself to contagion and a person who at one time may have been voluntarily intoxicated but has become a chronic alcoholic and therefore is unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated." 361 F.2d at 53.

Dr. Wade testified that "the individual who is afflicted with this disease has a compulsion to drink and he is unable to defy this compulsion." (A. 17). Recogni-

tion was also given to this principle in *Driver v. Hinnant:*

> "The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease." 356 F.2d at 764.

It is interesting to note that in *Robinson* the court cited copious authority to support their conclusion that narcotics addiction "may be contracted innocently or involuntarily." (370 U.S. at 667). Rejection of this "original sin" approach is even more compelling in the case of a chronic alcoholic. While non-medical use of narcotics is illegal throughout the United States, consumption of alcohol is, with certain restrictions, legal throughout this country. And, while a narcotics user may be a social outcast, the consumption of alcohol is often considered a social asset. Consequently, a person can become a chronic alcoholic without violating any law but only rarely does a narcotic user become addicted without doing so.

Where, as in this case, conduct cannot be controlled, there is no tenable reason for punishment. Neither deterrence nor rehabilitation are served. As stated by Mr. Justice Douglas in *Robinson,* "This prosecution has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it." (370 U.S. at 677-678).

The Fourth and District of Columbia Circuit Courts have heeded the Supreme Court's prophecy in *Robinson* and repudiated the inhuman practice of punishing the involuntary conduct of a chronic alcoholic.

> "Traditionally, we have tried to meet the problem of alcoholism by penal law. But there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the laws against drunkenness.'"[10]

This futility was recently commented on by John M. Murtaugh, Chief Administrative Judge, New York City Criminal Court:

> "There is no moral justification for the present program of wholesale arrests of drunken derelicts. We will neither solve nor ameliorate the skid row problem by more vigorous police enforcement or sterner justice. The only function of a penal approach is to keep depravity from becoming too assertively public.
>
> "Once we appreciate these almost self-evident truths, we must realize how farcical our primitive justice is and has been over the years. Today we recoil at the manner in which past generations used burning and whipping to curb crime. Is it not likely that future generations will read of our imprisonment of drunken derelicts with a similar sense of shock and outrage?" Murtagh, *Arrests for Public Intoxication,* 35 Ford.L.Rev. 14 (1966).

In the "light of contemporary human knowledge," under what "standards of decency that mark the progress of a maturing society" can appellant's conviction for public intoxication be considered a "civilized" practice? History has shown that such standards, if ever they existed, have long since been buried by medical advances in the diagnosis, treatment and care of chronic alcoholism. As Mr. Justice Holmes once wrote:

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[10]Guttmacher & Weihofen, *Psychiatry & The Law* 319 (1952).

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law,* 10 Harv. L.Rev. 457, 469 (1897).

Appellant submits that his conviction for public intoxication denies "the dignity of man" and is unconstitutional in violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

CONCLUSION

Appellant prays the judgment and sentence of the County Court at Law No. 1 of Travis County, Texas, be reversed and that costs be taxed against appellee.

Respectfully submitted,

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November, 1967

No. 405

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL, APPELLANT,

v.

THE STATE OF TEXAS, APPELLEE.

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR

American Civil Liberties Union
American Medical Association
Correctional Association of New York
Methodist Board of Christian Social Concerns
North American Association of Alcoholism Programs
North American Judges Association
North Conway Institute
Texas Commission on Alcoholism
Washington D.C. Area Council on Alcoholism

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AS AMICI CURIAE

American Civil Liberties Union, American Medical Association, Correctional Association of New York, Methodist Board of Christian Social Concerns, North American Association of Alcoholism Programs, North American Judges

Association, Texas Commission on Alcoholism, and Washington D.C. Area Council on Alcoholism hereby respectfully move for leave to file a brief as Amici Curiae in the above entitled case. Counsel for Appellant have consented to the filing of the attached brief. The consent of Counsel for Appellee was requested but refused.

The interests of Amici and their reasons for requesting leave to file a brief are set out at pages 2-5 of the attached brief.

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November 24, 1967

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 405

LEROY POWELL, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS

BRIEF FOR

American Civil Liberties Union
American Medical Association
Correctional Association of New York
Methodist Board of Christian Social Concerns
North American Association of Alcoholism Programs
North American Judges Association
North Conway Institute
Texas Commission on Alcoholism
Washington D.C. Area Council on Alcoholism

BRIEF FOR AMICI CURIAE

QUESTION PRESENTED

Whether the conviction of a chronic alcoholic for being found in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution.

INTERESTS OF AMICI CURIAE

Chronic alcoholism is a disease. Amici Curiae believe that neither this disease nor behavior that is its inherent symptom, public intoxication is a proper subject for the criminal law.

This case involves a single individual and a single arrest. But this Court's decision will control the fate of an estimated 500,000 indigent alcoholics throughout the country and will vitally affect the lives of their families, relatives, and neighbors. It will determine whether public intoxication will be handled in the future as a public health problem, the only course that offers any hope of success. Also at issue is whether the States and localities will continue to expend the energies of their police personnel on some 2,000,000 arrests for drunkenness each year – one out of every three arrests made – rather than direct them against serious criminal activity. This brief is intended to place the case in this larger context.

Amici strongly endorse the position that public drunkenness and chronic alcoholism are public health problems. Because a decision that would permit the continued prosecution of alcoholics for intoxication would stifle reform of the present system, they support Appellant's contention that the decision below must be reversed.

1. The American Civil Liberties Union, organized in 1920, is a national association dedicated to the preservation and protection of individual civil liberties. The ACLU's local affiliate, the National Capital Area Civil Liberties Union, provided the cooperating attorneys who litigated the *Easter* case,[1] and the ACLU and its affiliates have participated in

[1] *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965), *rev'd*, 261 F.2d 50 (D.C. Cir. 1966) (*en banc*). Counsel for Amici Curiae in the instant case represented Mr. Easter and have filed briefs for amici curiae in other similar cases. Counsel for Amici Curiae were also consultants and advisors to The President's Commission on Law Enforcement and Administration of Justice and to The President's Commission on Crime in the District of Columbia.

other cases involving the same issues throughout the country.

2. The American Medical Association, established in 1847, is the national professional organization for physicians. Its objective is to promote the science and art of medicine and the betterment of public health. The AMA is a federation of 54 state medical associations, including the Texas Medical Association. These state medical associations are federations of county medical societies, one of which is the Travis County Medical Society. More than 9,000 of the AMA's 200,000 individual physician members reside in the State of Texas. The AMA officially recognizes alcoholism as a disease that is properly within the scope of medical practice rather than the criminal law.[2] In 1966 the AMA ranked alcoholism with heart disease, mental illness, and cancer as the most serious health problems confronting this country.

3. The Correctional Association of New York, established in 1844, is an organization of private citizens whose purpose is to promote the most efficient and effective use of correctional institutions. In 1965 the Association co-authored, with the International Association of Chiefs of Police, a police handbook on alcohol and alcoholism urging that alcoholism be handled as a health problem.[3]

4. The Methodist Board of Christian Social Concerns, established in 1960 as the successor to the Methodist Board of Temperance and Public Morals, is the official arm of the Methodist Church concerned with current national social policy. The Methodist Church, one of the primary forces behind the temperance movement in the United States and the adoption of the Eighteenth Amendment, recognizes

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[2] See Appendix A.

[3] The Correctional Assn of New York & The International Assn of Chiefs of Police, *Alcohol & Alcoholism: A Police Handbook* (1965).

chronic alcoholism as a disease that requires medical treatment rather than criminal punishment.[4]

5. The North American Association of Alcoholism Programs, organized in 1949, is comprised of 88 official State or local tax-supported programs working in the field of alcoholism, including the Texas Commission on Alcoholism. NAAAP recognizes alcoholism as a disease and opposes use of criminal sanctions in the handling of public intoxication.

6. The North American Judges Association, founded in 1960, is comprised of over 800 local judges in the lower courts in which chronic alcoholics regularly appear charged with public intoxication and other minor related offenses. NAJA believes that handling these people through the criminal courts neither deters nor rehabilitates them.

7. The North Conway Institute, organized in 1954, is an interdenominational ecumenical organization concerned with the problem of alcoholism and how religion can realistically deal with it. The Institute believes that intoxication and alcoholism should be handled as social and public health problems rather than as criminal offenses.

8. The Texas Commission on Alcoholism is an official arm of the Government of the State of Texas comprised of six members who are appointed by the Governor and confirmed by the Senate. The Commission was created by statute in 1953.[5] Section 1 of that statute states, and the Commission believes, that alcoholism is an illness that should be handled by public health procedures rather than as a criminal offense.

9. The Washington D.C. Area Council on Alcoholism, organized in 1947, is a voluntary community health organization supported by the United Givers Fund and private con-

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[4] *Doctrines and Disciplines of the Methodist Church* ¶ 1822.1 (1964). See also Jackson, *Stumbling Block: A Study of Alcohol and Christian Responsibility* (1960).

[5] Article 5561c, § 4, of the Texas Civil Statutes, Acts 1953, 53d Leg., p. 983, ch. 411.

tributions. In 1964 WACA initiated the *Easter* litigation to establish that alcoholism is a public health rather than a criminal problem. WACA has filed briefs as amicus curiae in several other cases in which alcoholism was raised as a defense to public intoxication, and during the past four years it has led a campaign to remove the handling of public drunkenness from the criminal system.

STATEMENT OF THE CASE

I. Proceedings Below

On December 19, 1966, Officer Mauldin of the Austin Police Department observed Appellant Leroy Powell in an intoxicated condition in the 2000 block of Hamilton Street in the City of Austin, and placed him under arrest for violating Article 477 of the Texas Penal Code:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was found guilty and fined $20 in the Corporation Court of the City of Austin on December 20, 1966.

Appellant appealed his conviction to the Travis County Court at Law No. 1 (referred to throughout this brief as the "trial court" or as the "court below"), which held a trial *de novo* on April 5, 1967. Expert psychiatric and other testimony was presented to prove that his public intoxication was an involuntary symptom of the disease of chronic alcoholism. It was established that Appellant is a chronic alcoholic and that his public intoxication is a compulsive symptom of his disease. Appellee, which offered no contradictory evidence, did not dispute these facts in the court below or in its Motion to Dismiss the Appeal to this Court.

A. *Appellant's Life History and Present Condition*

1. Appellant's Life History

Appellant is 66 years old. He is married and has one child, a daughter. Although Appellant sometimes spends nights at home, he usually sleeps in public places, such as the sidewalk, when he gets drunk. He does not support his wife or child.[6]

Appellant worked as a laborer for the City of Austin until he injured his back in 1955. Since then he has been unable to do heavy work. Beginning in 1956 or 1957 he has worked in a tavern shining shoes. He currently earns about $12 per week, which he uses to buy wine.[7]

Appellant began drinking alcoholic beverages in about 1925. His Austin Police Department arrest record shows that he was first arrested there for public drunkenness in 1949, and that he has been arrested for drunkenness at least once every year since 1952. He has been arrested for drunkenness on some 25 other occasions outside Travis County, primarily in Bastrop County.[8]

The fine customarily imposed for drunkenness in Travis County is $20 and in Bastrop County is $25. Appellant is usually unable to pay the fine when he is arrested, and therefore is required to work it off in jail.[9] The record does not disclose how many months he has spent in jail in lieu of paying fines.

Appellant's arrest record is only illustrative of his drinking problem. He testified that he has been "pretty lucky" in not being arrested when he is drunk.[10] The record shows

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[6] A. 34, 36, 37, 42.

[7] A. 34, 35, 37.

[8] A. 35, 36, 50.

[9] A. 23, 36, 41.

[10] A. 35, 36.

that he drinks wine every day and becomes so drunk he passes out about once a week. The only limitation on his consumption of alcohol is his meager income.[11] Appellant took four or five drinks the night before his trial, and another drink at 8 A.M. the morning before his trial. The money for his morning drink was given to him, and he would have had more to drink at that time if he had been given more money.[12]

As a result of constant drinking and intoxication Appellant has been unable to find employment anywhere but at the tavern. He applied for jobs both at the Austin Independent School District and at the State Office Building but was turned down because of his drinking problem.[13]

Appellant's drinking, however, has not threatened harm to any member of the public. Officer Mauldin testified that he was not engaged in loud or boisterous conduct, was not fighting, and did not resist arrest. Apart from a single arrest for disorderly conduct in 1951, all of Appellant's arrests have been for public drunkenness.[14]

As would be expected, alcoholism has impaired Appellant's perception and memory. He testified that he does not al-

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[11] A. 23, 38, 39, 43, 44.

[12] A. 41, 42, 43, 44.

[13] A. 38.

[14] A. 9, 10, 23, 28, 29, 30, 31, 32, 36. Amici are unable to reconcile Lt. Darby's statement (A. 32) that Appellant was arrested for disorderly conduct on March 21, 1951, with the summary of Appellant's arrest records (A. 50) which shows no arrest in 1951. In any event, there is no evidence of record that the reported single char of disorderly conduct resulted from violence or any other activit that might be considered potentially harmful to the public. Alcoholics are frequently arrested and charged with disorderly conduct even though their sole misconduct consists of public intoxication. See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness* 1 n.1 (1967).

ways know where he is after he starts drinking. Indeed, he was unable to recall anything about his arrest for drunkenness on December 19, 1966 – when he started drinking, where he was arrested, whether he talked to Officer Mauldin, or when or how he got out of jail. He could not recall Christmas day, 1966.[15] Whole episodes of his life have been lost in an alcoholic fog.

2. Medical Diagnosis of Appellant's Condition

David Wade, M.D., examined Appellant prior to trial and testified as to his present condition.[16]

After receiving his M.D. degree in 1939, Dr. Wade spent 3 years in a psychiatric residency. He has since specialized in psychiatry and has been especially interested in the problem of alcoholism. He is a Board-certified psychiatrist.[17] Dr. Wade is Chief of Staff at St. Jude's Oak Ridge Hospital, a private psychiatric hospital, about 10 percent of whose patients have an alcoholism problem. He has been the superintendent of two Texas State mental institutions. He currently serves on the staffs of four hospitals in the City of Austin and as a consultant at the Kerrville Veterans Administration Hospital and at the Austin State Hospital. He co-founded a branch at Texas Christian University of the Yale School for Alcoholic Study, and frequently lectures and writes on the subject of alcoholism. In addition, he is a former President of the Texas Medical Association and was on the Association's Board of Counsellors for a term of 9 years.[18]

Based upon his examination of Appellant, including an interview relating to his past history, Dr. Wade concluded that Appellant is a chronic alcoholic. He testified that Ap-

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[15] A. 37, 40, 41.

[16] A. 22.

[17] A. 12, 13, 15.

[18] A. 13, 14, 15.

pellant has a history of excessive drinking dating back to his early years and that he now rarely passes a week without going on an alcoholic binge.[19]

Dr. Wade described Appellant's drinking pattern as "fairly typical of most alcoholics." He buys a bottle of wine with the intention that he will not get drunk, but he usually is unable to stop drinking until he passes out.[20] In Dr. Wade's opinion, Appellant is no longer able to control his behavior because "he has an uncontrollable compulsion to drink." He lacks the will power to resist the constant excessive consumption of alcohol and has not been given medical treatment to enable him to develop this will power.[21]

B. *Appellant's Chronic Alcoholism Is a Disease and His Public Intoxication Is a Symptom of That Disease*

The evidence of record demonstrates that Appellant's drunkenness on December 19, 1966 was the inevitable product of his illness, chronic alcoholism. Dr. Wade testified that the American Medical Association and the National Council on Alcoholism both recognize that alcoholism is a disease. He stated that, while there is disagreement whether alcohol is addicting or habituating, in either event a chronic alcoholic is an involuntary drinker who has lost self-control over his drinking and has an uncontrollable compulsion to drink.[22]

Dr. Wade also testified that Appellant's public intoxication was symptomatic of this disease. Intoxication is, of course, an inherent symptom of alcoholism. Dr. Wade testified that intoxication alters an alcoholic's ability to control his behavior. Losing his sense of values and judgment,

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[19] A. 22, 23.

[20] A. 23.

[21] A. 23, 24.

[22] A. 15, 16, 17, 18, 19, 20, 21, 24.

he frequently will appear in public places while intoxicated. Thus, his presence in public in a state of intoxication is, in Dr. Wade's opinion, as involuntary as his intoxication.[23]

Dr. Wade's opinions are borne out by Appellant's testimony. Appellant stated that he frequently does not know where he is when he is intoxicated. He was unable to remember anything about the events preceding or succeeding his December 19, 1966 arrest.[24]

Dr. Wade pointed out that a chronic alcoholic is subject to two forms of compulsion to drink. The compulsion to take the initial drink, "an exceedingly strong influence" which he is "unable to defy," coupled with the alcoholic's belief that he can control his drinking, makes the first drink inevitable. The alcoholic is also under a compulsion to continue to drink, a compulsion that is uncontrollable unless alcoholic beverages are simply unavailable.[25]

It is probably impossible for an expert witness to describe in lay terms the way in which alcoholism acts upon the individual. The etiology of the disease is not yet understood. Indeed, it was only ten years ago that the medical profession first recognized that delirium tremens are the withdrawal symptoms of alcoholism. But the medical profession is unanimous that the chronic alcoholic drinks involuntarily, as a result of some as yet poorly understood compulsion generated by his disease. No medical authority today suggests that an alcoholic's public intoxication is a product of his freely-exercised volition.

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[23] A. 19, 20, 17.

[24] A. 37, 40, 41.

[25] A. 16, 17, 24, 25, 26, 27.

C. *Appellant Could Be Helped by Appropriate Treatment for His Alcoholism*

Appellant appreciates that he has a drinking problem and wants help. He admitted that he is an alcoholic and is unable to control how much liquor he consumes or where he goes after he becomes intoxicated.[26] His drinking will continue uninterrupted, except by periodic imprisonment, unless treatment is provided.

Dr. Wade testified that an alcoholic can recover from his illness if given proper medical treatment. Large numbers of former alcoholics have been successfully treated.[27] He emphasized, however, that neither confinement in jail nor a monetary fine has any value in treating a chronic alcoholic. He testified that Appellant has not received medical or psychiatric treatment or ever been sent to the State Hospital or referred to Alcoholics Anonymous, notwithstanding the obviousness of his problem. In Dr. Wade's opinion, without proper medical treatment Appellant cannot develop the will power necessary to enable him to resist the constant excessive consumption of alcohol.[28] Appellant's history confirms this opinion.

II. The Trial Court's Findings of Fact and Conclusions of Law

Based upon this uncontradicted evidence the court below entered the following Findings of Fact, adopting Appellant's factual contentions (A. 53):

> "1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

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[26] A. 37, 38, 39.

[27] A. 20.

[28] A. 23, 24, 25.

"2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

"3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

These findings confirmed the views expressed in 1953 by the Texas Legislature in enacting the statute creating the Texas Commission on Alcoholism.

Article 5561c of the Texas Civil Statutes recognizes chronic alcoholism as an illness that is properly handled through public health facilities and programs. Section 1 sets forth the legislative policy:

"Alcoholism is hereby recognized as an illness and a public health problem affecting the general welfare and the economy of the State. Alcoholism is further recognized as an illness subject to treatment and abatement and the sufferer of alcoholism is recognized as one worthy of treatment and rehabilitation. The need for proper and sufficient facilities, programs and procedures within the State for the control and treatment of alcoholism is hereby recognized."

Section 3(c) defines "alcoholic" as including "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages."

Section 4 of Article 5561c establishes the Texas Commission on Alcoholism, one of Amici Curiae, as an arm of the State government. Among the Commission's duties, as set out in Section 5, are to "focus public attention on" and "promote or conduct educational programs on alcoholism," and to "provide for treatment and rehabilitation of alcoholics."[29]

[29]The views of the Texas Commission on Alcoholism on intoxication and alcoholism are set out in its *Law Enforcement Handbook on Alcohol Problems*, summarized in Appendix B.

Appellant argued[30] in the court below that, given its Findings of Fact, Article 477 was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution as applied to him. Notwithstanding the undisputed facts and the legislative findings in Article 5561c, the court entered the following Conclusions of Law rejecting this constitutional defense (A. 53):

> "1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court therefore found Appellant guilty as charged and increased his fine to $50.[31]

The court below filed no opinion elucidating its Conclusions of Law. The only possible basis for its decision, however, would appear to be Article 36 of the Texas Penal Code:

> "Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, or narcotics, or a combination thereof, shall constitute any excuse for the commission of crime."

The Texas courts have consistently held this provision applicable to any product of acute intoxication caused by excessive drinking, with the exception of delerium tremens which is an "involuntary result" of drinking and affords a complete defense to crime.[32] In substance, therefore, the court below held that, although Appellant's public intoxica-

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[30] A. 1-2, 44-45, 51-52, 55-56.

[31] A. 46, 54, 58.

[32] See, *e.g.*, *Evers v. State*, 31 Tex. Cr. Rep. 318, 20 S.W. 744, 18 L.R.A. 421, 37 Am. St. Rep. 811 (1892); *Martinez v. State*, 137 Tex. Cr. Rep. 434, 128 S.W.2d 398 (1939).

tion was involuntary as a matter of fact, it must be deemed to have been "voluntary" as a matter of Texas law.

III. The Appeal to This Court

Having no right to a further appeal within the Texas court system,[33] Appellant filed a jurisdictional statement in this Court under 28 U.S.C. § 1257(2). Probable jurisdiction was noted on October 9, 1967.

SUMMARY OF ARGUMENT

Amici rely on the basic principle of Anglo-American law that only voluntary conduct is subject to criminal sanctions. Under long-settled common law a person cannot be punished for conduct produced by a disability that is recognized as depriving him of the capacity to refrain from his offending behavior. The name of his disability is not important. Neither is its cause. The sole determining factor is whether it deprives him of the capacity to control his conduct.

Insanity has long been judicially recognized as a disease that can deprive a person of the ability to control his behavior. An epileptic's seizure unquestionably excuses conduct that would otherwise be deemed "disorderly." A person forced to consume an excessive quantity of alcohol would not be subject to conviction for public intoxication in any jurisdiction. Similarly, Appellant, whom the trial court found to be unable to control his conduct because of his chronic alcoholism, cannot be punished for a symptom of that disease, public intoxication. As in the case of mental disease, the cause of alcoholism is irrelevant to whether it excuses behavior that would otherwise be criminal. The proper question in both cases is whether the illness in fact

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[33] See Art. 4.03 of the Texas Code of Criminal Procedure.

deprived the defendant of the capacity to control the conduct for which he is prosecuted.

The principle that involuntary conduct cannot be punished as criminal is fundamental in our criminal law. Even statutes prohibiting so-called "public welfare offenses," which do not require criminal intent (a *mens rea*), require that the defendant engage in the act of his own free will (an *actus reus*). No court of final jurisdiction has ever ruled that insanity or any other disease that is recognized as producing involuntary conduct is not a defense to a criminal charge. Punishment of involuntary behavior neither deters the defendant nor protects the public. Such punishment is neither logical nor moral. It serves no socially redeeming purpose and must be condemned as unconscionable by a civilized society.

A conviction that affronts this fundamental principle constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment to the United States Constitution. This is the essence of this Court's ruling in *Robinson v. California* 370 U.S. 660 (1962), that a person may not be criminally punished for being ill, since his illness is not a voluntary act. The United States Court of Appeals for the Fourth Circuit, in *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), held this principle applicable to facts identical to those presented by this case. That court ruled that the conviction of a chronic alcoholic for being drunk in a public place contravenes the Eighth Amendment. The United States Court of Appeals for the District of Columbia Circuit, in *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966)(*en banc*), likewise has unanimously held that a chronic alcoholic cannot be convicted for being drunk in public because his disease has destroyed his capacity to avoid such conduct.

The court below, taking into consideration all the evidence of record, found as a fact that Appellant's conduct—his public intoxication—was not caused "by his own volition" but by "a compulsion symptomatic of the disease of chronic alcoholism." This disease, it also found, "destroys

the afflicted person's will power to resist the constant, excessive consumption of alcohol." The court nevertheless ruled, as a matter of law, that Appellant is criminally responsible for this involuntary conduct. This decision manifestly imposes cruel and unusual punishment and must therefore be reversed.

Reversal of the lower court's decision would be entirely consistent with the recent recommendations of the U.S. and D.C. Crime Commissions, and is supported by judicial, penal, law enforcement, medical, church, and other community leaders. It would promote the development of proper public health procedures for the handling of intoxication and alcoholism. Affirmance, on the other hand, would stifle recent efforts to reform the present system.

ARGUMENT

This case presents a narrow issue of constitutional law: Do the Eighth and Fourteenth Amendments to the United States Constitution permit a State to punish a chronic alcoholic for appearing in a public place in an intoxicated condition under compulsion of his disease.

No questions of fact remain to be resolved. On the basis of uncontradicted testimony, and supported fully by current medical opinion, the lower court found:

First, that Appellant is a chronic alcoholic;

Second, that Appellant's intoxication on December 19, 1966 was caused by his disease, not by his own volition, and therefore was involuntary; and

Third, that Appellant's appearance in public in an intoxicated condition on December 19, 1966 was symptomatic of his disease, rather than the result of his conscious decision, and therefore also was involuntary.

These Findings of Fact, undisputed by Appellee in its Motion to Dismiss, are binding upon this Court.

Amici do not suggest that the court below misapplied the law of Texas. They agree that Texas law does not now recognize the defense which they believe the Constitution requires.

I. The Eighth and Fourteenth Amendments Proscribe Punishment That Is Found Irrational or Uncivilized When Measured Against Contemporary National Standards.

Because he is a chronic alcoholic, Appellant cannot control his drinking or his appearance in public in an intoxicated condition. His basic contention, which Amici support, is that his conviction for an act he could not avoid committing constitutes cruel and unusual punishment proscribed by the Eighth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment:[34]

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amici do not question the mode of Appellant's punishment. They contend that the State of Texas lacks authority to punish him at all.

The decisions of this Court construing the Eighth Amendment disclose two basic principles underlying the constitutional prohibition against "cruel and unusual punishments." First, the prohibition "is not static" but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S.

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[34] In *Francis v. Resweber*, 329 U.S. 459 (1947), this Court assumed, and in *Robinson v. California*, 370 U.S. 660 (1962), it held, that the Fourteenth Amendment's due process clause incorporates the prohibitions of the Eighth Amendment.

86, 101 (1958).[35] Practices once tolerated may now be found to be "cruel and unusual" in the light of contemporary knowledge. Second, the focus of judicial inquiry in each case is whether, when measured against contemporary national standards, the punishment amounts to intolerable treatment. A form of punishment sanctioned by long usage may nevertheless have become "cruel and unusual" when measured by contemporary standards.

Basic substantive standards of the Eighth Amendment have emerged from a long series of decisions. Certainly such barbarisms as "burning at the stake, crucifixion, breaking on the wheel" and "the torture, the rack or thumbscrew" are forbidden. *In re Kemmler*, 136 U.S. 436, 446 (1890); *O'Neil v. Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting). But this Court has in addition declared that the Eighth Amendment, "to be vital must be capable of wider application than the mischief which gave it birth," and that any punishment that would "shock the sensibilities of men" or "shock public sentiment and violate the judgment of reasonable men" is proscribed. *Weems v. United States*, 217 U.S. 349, 373, 375 (1910); *Jackson v. United States*, 102 F. 473, 488 (9th Cir. 1900).[36] In *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), the Court stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

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[35]The Kentucky Supreme Court suggested that the Amendment was intended to keep pace "with the progress of humanitarianism." *Weber v. Commonwealth*, 303 Ky. 56, 66, 196 S.W.2d 465, 469 (1946). A United States District Court stated that, since "the Eighth Amendment is to be considered in the light of developing civilization," it is "not necessary to speculate as to what might have been considered cruel and inhuman punishment in 1787." *Ex Parte Pickens*, 101 F. Supp. 285, 288 (D. Ala. 1951).

[36]In *Hayes v. United States*, 112 F.2d 417, 420 (10th Cir. 1940), the court stated that the appropriate test was whether the punishment would "shock the sense of mankind." Similarly, the court in *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960), inquired whether the punishment "shocks a balanced sense of justice."

Most recently, in *Robinson v. California*, 370 U.S. 660 (1962), this Court concluded that, "in the light of contemporary human knowledge," it is cruel and unusual to punish anyone for having a disease. Mr. Justice Douglas in concurring observed that "the Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man," and agreed that "imprisonment for being sick" is as unconstitutional under this standard as "disemboweling a person alive." 370 U.S. at 676.

Measured against these Eighth Amendment standards, Appellant's conviction for public intoxication, an involuntary symptom of his disease, must be reversed.

II. Punishment of Appellant for Public Intoxication Is Neither Rational nor Civilized.

Punishment of one who lacked capacity to control his behavior is inconsistent with our common law tradition and violates contemporary national standards.

A. *Appellant's Conviction Violates Established Common Law Principles of Criminal Responsibility Long Held Basic to Civilized Society.*

The common law has long held that a person's inability to control his behavior is a defense to a criminal charge:[37]

> "The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choos-

[37] Many legal scholars separate criminal capacity into two essential elements: a volitional act (*actus reus*), which requires the capacity to choose between alternative courses of conduct; and an intent (*mens rea*), which requires the ability to understand their moral consequence and to choose between them on this basis. See, *e.g.*, Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S. Car. L. Rev. 349 (1967); Note, 36 U. Cin. L. Rev. 258 (1967); Note, 52 Corn. L.Q. 470 (1967).

> ing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice." Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004 (1932).

One who is incapable of following a different course of conduct is therefore not subject to criminal sanctions:[38]

> "When a person possessing capacity for choice and control, nevertheless breaches a duty of this type he is subjected to the sanctions of the criminal law. He is subjected to these sanctions not because of the act alone, but because of his failure to exercise his capacity to control his behavior in conformity with the demands of society." *United States v. Currens*, 290 F.2d 751, 773 (3d Cir. 1961).[39]

Texas law embodies the same principle:[40]

> "Punishment of crime rests upon the theory that the criminal not only has possession of his will but of

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[38] Cf. Aristotle, *Nichomachean Ethics*, Bk. III, ch. i, at 200 (Odyssey Press 1951):

> "But it is only when a man feels or acts willingly that he deserves praise or blame; feelings or actions that are unwilling are pardoned or even pitied. To distinguish willing from unwilling conduct, therefore, is presumably incumbent upon students of ethics, and will also be of service to legislators in meting out honors and punishments."

[39] See also *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 867 (1951), where the court stated that criminal responsibility requires "deliberate, voluntary and intentional" action.

[40] It is unnecessary in this case to determine whether or not, under Texas law, public intoxication is a "public welfare offense" that does not require proof of *mens rea*. See *Morisette v. United States*, 342 U.S. 246 (1952). In either case an *actus reus* must also be proved, and the court below found that Appellant's public intoxication was not a voluntary act. No court of final jurisdiction has ever held that proof of an *actus reus* is not a prerequisite to conviction for any criminal offense. To do so – and thus to punish involuntary conduct – would be manifestly unjust and uncivilized.

> the power to control it. It is upon this fact that human responsibility must rest." *Evers v. State,* 31 Tex. Cr. Rep. 318, 328, 20 S.W. 744, 747 (1892).

Insanity, of course, is the most familiar instance in which an individual is held not criminally responsible because he does not possess the capacity either to exercise free choice or to control his offending conduct:

> "To understand the defense of insanity one must keep constantly and clearly in mind the basic postulate of our criminal law—in the words of Dean Pound, quoted by Justice Jackson in Morisette, 'a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.' If a man . . . is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment." *Carter v. United States,* 102 App. D.C. 227, 235, 252 F.2d 608, 616 (1957).

Duress has excused criminal responsibility for public intoxication.[41] Sleepwalking,[42] the influence of medication,[43] epilepsy,[44] youth,[45] and kleptomania[46] have likewise been recognized as defenses under this fundamental principle. All produce involuntary behavior, which is not punishable under common law.

Similarly, at common law *involuntary intoxication* negated criminal responsibility. It is settled law throughout the

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[41] *Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

[42] *E.g., Bradley v. State,* 102 Tex. Cr. Rep. 41, 227 S.W. 147 (1925); *Fain v. Commonwealth,* 78 Ky. 183, 39 Am. Rep. 213 (1879).

[43] *E.g., Pribble v. People,* 49 Colo. 210, 112 Pac. 220 (1910).

[44] *E.g., People v. Freeman,* 16 Cal. App. 2d 110, 142 P.2d 435 (1943).

[45] *E.g., Allen v. United States,* 150 U.S. 551 (1893).

[46] *E.g., State v. McCullough,* 114 Ia. 532, 87 N.W. 503 (1901).

country that involuntary intoxication is a defense to crime, but voluntary intoxication is not.[47]

It is not necessary to argue at length for this established principle. Nor can there be serious dispute that its contravention would violate contemporary standards of justice. Punishment of involuntary action resulting from illness cannot possibly serve to deter similar conduct in the future, or make the defendant more diligent in the future, or more adequately protect the public, or even reform him. It can only provide a means for inflicting the community's vengeance upon him for having a disease, a purpose our morality does not countenance.[48]

No authority has been found which questions the proposition that *voluntary action* is a prerequisite to culpability in cases involving drunkenness. Lord Hale's *Pleas of the Crown*

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[47]See, *e.g.*, Miller, *Handbook of Criminal Law* § 43, at 141 (1934): "No criminal responsibility attaches for acts committed in a state of involuntary drunkenness, destroying the reason and will."

[48]Samuel Butler recounted the cruelty of punishing the sick in Chapter XI of his satire, *Erewhon*. One unfortunate was convicted of "pulmonary consumption" and sentenced to "Imprisonment, with hard labor, for the rest of your miserable existence." The judge reproached him:

> "It is intolerable that an example of such terrible enormity should be allowed to go at large unpunished. Your presence in the society of respectable people would lead the less able-bodied to think more lightly of all forms of illness; neither can it be permitted that you should have the chance of corrupting unborn beings who might hereafter pester you.
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> * * *
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> "But I will enlarge no further upon things that are themselves so obvious. You may say that it is not your fault. * * * I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected. You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate."

ch. IV (circa 1675) stated that, while voluntary intoxication provided no excuse for crime, two types of involuntary intoxication would exculpate: intoxication caused by (1) the "stratagem or fraud of another" or by (2) a "habitual or fixed phrenzy [disease]" brought on by persistent voluntary drinking. The legal rules subsequently followed in American jurisdictions can be traced directly to this treatise.[49] But although Lord Hale's legal rules remain intact—as they properly should—courts have reached contradictory conclusions in applying them.

Only one reported decision prior to 1966 clearly recognized chronic alcoholism to be available as a defense to criminal prosecution. In *State v. Pike*, 49 N.H. 399, 407-408, 429-412 (1869), the New Hampshire Supreme Court affirmed the trial judge's submission to the jury of the questions whether the defendant's dipsomania—as chronic alcoholism was then called—was a disease and whether that disease caused his unlawful acts. 49 N.H. at 407-408. The court thus held that chronic alcoholism could deprive a defendant of his criminal capacity.

Judge Doe's opinion in *Pike* rested upon the principle on which Appellant relies:

> "When disease is the propelling uncontrollable power, the man is as innocent as the weapon,—the mental and moral elements are as guiltless as the material. If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part. If a man knowing the difference between right and wrong, but deprived, by either of those agencies, of the power to choose between them is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very

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[49] See, *e.g.*, *People v. Rogers*, 18 N.Y. 9, 18 (1858).

thing for which the law says he shall not be punished." 49 N.H. at 441-442.

Judge Doe realized that a court must restrict itself to general *legal* principles, and must rely upon the expert testimony of physicians for current *medical* knowledge. He denounced judicial perpetuation of obsolete medical views in the guise of legal rules:

> "Defective medical theories [have] usurped the position of common-law principles.
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> "The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside." 49 N.H. at 438.

The *Pike* case represents the settled law of New Hampshire since 1869.

By contrast, the decision of the court below follows a line of cases in which courts refused, as a matter of law, to recognize that alcoholism is a disease and that a chronic alcoholic's intoxication is involuntary. The case most frequently cited is *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888), in which the North Carolina Supreme Court held that intoxication will not excuse crime even if caused by chronic alcoholism:

> "Voluntary drunkenness does not excuse crime, nor does our law recognize, as excusing, what is called 'dipsomania,' or distinguish between an irresistible impulse for intoxicating drinks and a mere inordinate appetite for them, brought on by long and continual indulgence.
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> * * *
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> "Nor can we entertain as a defense the insatiable thirst, intensified by long indulgence, which is denominated

'dipsomania' . . ." 100 N.C. at 464-465, 6 S.E. at 660.

The District of Columbia Court of Appeals relied upon *Potts* in the *Easter* case, 209 A.2d at 627, but its rationale was rejected by all eight judges of the United States Court of Appeals for the District of Columbia Circuit. 361 F.2d at 53.

Potts is demonstrably unsupportable in law or fact. The court in *Potts* concluded that, because alcoholism is voluntarily induced (*e.g.*, Appellant presumably took his first drink, some 40 years ago, voluntarily), an alcoholic is morally and legally responsible for all subsequent drinking and its consequences. But in *every* jurisdiction actual insanity and even delirium tremens (which, until the early 1950's, was thought to be a form of temporary insanity produced by alcohol rather than a symptom of alcoholism caused by alcohol withdrawal)[50] have long been accepted as a complete defense to crime, even though produced by what was originally voluntary drinking.[51] This "original sin" approach to alcoholism, unlike insanity and delirium tremens, cannot be justified on any rational basis.

It is apparent from its opinion that the court in *Potts* refused to believe that alcoholism is a disease. In effect, the court resorted to a legal *fiction* that all drinking by an alcoholic must, as a matter of law, be deemed "voluntary" and hence not exculpatory.

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[50] Johnson, *The Alcohol Withdrawal Syndromes*, Quarterly Journal of Studies on Alcohol Supp. No. 1 at 66, 71 (November 1961). Delirium tremens, the severe withdrawal symptoms suffered by chronic alcoholics when they stop drinking, range from convulsions to hallucinations, and "are more dangerous to the life of the individual than are any of the manifestations of withdrawal of morphine." World Health Organization Expert Committee on Alcohol and Alcoholism, *Report*, Tech. Rep. Ser. No. 94, at 6-7, 11 (June 1955).

[51] *E.g.*, *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539 (1854); *United States v. McGlue*, 26 Fed. Cas. No. 15,679 (C.C.D. Mass. 1851) (Curtis, J.); *United States v. Drew*, 25 Fed. Cas. No. 14,993 (C.C.D. Mass. 1828) (Story, J.).

Professor Jerome Hall has pointed out that "traditional attitudes of hostility towards drunkenness render rational and just determinations more difficult than in insanity cases."[52] He has attributed the "unenlightened" results reached in *Potts* and similar drunkenness cases to the "harsh moral bias" of the courts, which "adds cruelty to misfortune" by "refusing to acknowledge that many defendants are diseased."[53] This bias may have reflected the sparsity of the medical information then available or emanated from the strongly held religious belief that all intoxication is immoral.[54] Whatever its origin, it can no longer be justified.

Medical authorities now recognize[55]—as did the Congress in 1947,[56] the Texas Legislature in 1953, and the court below in its Finding of Facts—that chronic alcoholism is a disabling illness characterized by a compulsion or loss of self-control over the use of alcohol that renders intoxication involuntary.[57]

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[52]Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944).

[53]*Id.* at 1057, 1060, 1061. This hostility is even more apparent in *Choice v. State*, 31 Ga. 424, 471-482 (1860) and *Goodwin v. State*, 96 Ind. 550, 579 (1884).

[54]See, *e.g.*, Leviticus 10:9; Proverbs 20:1, 23:31, 31:4; Isaiah 5:11, 23:1; Habakkuk 2:5, 2:15; Luke 1:15; 1 Corinthians 6:10; Ephesians 5:18.

[55]Representative medical authorities are collected in Appendix A.

[56]Section 24-501 *et seq.* of the District of Columbia Code, 61 Stat. 744 (1947). See 93 Cong. Rec. 3357 (April 14, 1947); "Rehabilitation of Alcoholics," *Hearings before the Subcommittee on Health, Education, Recreation, of the Committee on the District of Columbia, House of Representatives,* 80th Cong., 1st Sess., on H.R. 496 (1947).

[57]Hoff, *Alcoholism*, the Encyclopedia of Mental Health 179 (1963): "The alcoholic's drinking is a symptom of uncontrollable forces inherent in his illness." Plaut, *Summary of Conference* in *Proceedings of*

Under the common law principles enunciated by Lord Hale, Appellant should have been acquitted. The trial court, in Judge Doe's words, relied upon "an extinct medical theory pretending to be legal authority"—the *Potts* legal fiction—and reached an indefensible result.

The record demonstrates the senselessness of punishing Appellant for his involuntary public intoxication.[58] The frequency with which Appellant has been arrested makes clear that criminal sanctions have served only as a means of inflicting vengeance. His periodic convictions and imprisonment have become mere tradition. He has not been deterred[59] or rehabilitated as a result of their repetition, and his incarceration has not effectively isolated him from the community.

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the Massachusetts Conference on Alcohol, Alcoholism, and Crime 116, 117 (June 1962): The chronic alcoholic's drinking "is very different from the social drinker;" he "drinks for different reasons," he "'needs' the alcohol," his "drinking is out of control," he "no longer conforms." Vogel, *Psychiatric Treatment of Alcoholism,* 315 The Annals of the American Academy of Political and Social Science 99, 100 (January 1958): "For general purposes, alcoholics can be described as those people who drink in a very special way—that is, to excess, compulsively, without control, and self-destructively." See generally Bacon, *Alcoholics Do Not Drink,* 315 The Annals of the American Academy of Political and Social Science 55 (January 1958).

[58]The record evidence in other recent cases contesting the conviction of chronic alcoholics for public intoxication underscores the futility of this practice. See the summaries of the record evidence in the *Driver, Easter, Hill,* and *Hoy* cases in Appendices C-F.

[59]Repeated incarceration actually aggravates the chronic alcoholic's inability to avoid public intoxication. *D.C. Crime Commission Report* at 486; Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 1, 42, 51-52, 139-146 (1958); Rubington, *The Chronic Drunkenness Offender,* 315 The Annals of the American Academy of Political and Social Science 65, 66-67 (January 1958); Goff, *Correction and the Alcoholic,* in *Proceedings of the Department of Health, Education and Welfare Conference on the Court and the Chronic Inebriate* 21-24 (April 1965). The American Medical Association has stated that "basic for any and all treatments" for chronic

> "Two policies underlie the distinction in treatment between the responsible and the non-responsible: (1) It is both wrong and foolish to punish where there is no blame and where punishment cannot correct. (2) The community's security may be better protected by hospitalization . . . than by imprisonment." *Williams v. United States*, 250 F.2d 19, 25-26 (D.C. Cir. 1957).

Perpetuating this pattern of prosecution and conviction will neither reform his behavior nor protect the public.

Appellant's future will be bleak, indeed, if this Court holds that Article 477 of the Texas Penal Code may validly be applied to him. After laying out his fine in jail, he will return to the streets and, inevitably, to another alcoholic binge. The Austin Police, who know Appellant well, may permit him to remain free a few days as they have often done in the past, but eventually he will again be arrested, convicted, fined, and returned to jail. This process will be repeated as long as he lives. Any doubt about the inevitability of this future is dispersed by Appellant's testimony and past arrest record, by Dr. Wade's medical diagnosis, and by the histories of Driver, Easter, Hill, and Hoy set out in Appendices C-F. Nothing in the record suggests the possibility of a different future for Appellant or other indigent alcoholics.

Amici do not believe that Appellant is suffering from mental illness or that chronic alcoholism is a form of insanity.[60]

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alcoholism is that "the condition must always be thought of by family and friends as a disease, not as a 'sin' or perversion that can be cured by punishment." American Medical Association, *Today's Health Guide* 462 (1965).

[60] Alcoholism and insanity may, but need not, coincide:

> "There is an unresolved debate as to the number of alcoholics who have psychological or emotional disturbances underlying their alcoholism. Dr. Flemming, about ten years ago at Yale in speaking of hundreds of private cases he had reviewed, estimated this at about 28 percent; in other words, 72 percent were without any serious mental disturbances. Dr. Selden Bacon, at the same time, would like to set this figure much

They do contend, however, that Appellant cannot avoid his public intoxication, and that diseases other than insanity can negate criminal responsibility.

It would make no practical difference if Appellant's public intoxication were the result of insanity or duress, rather than chronic alcoholism. He would have had no greater control over his resulting intoxication. In any of these circumstances, criminal punishment would be as shocking and barbarous as it would be futile.

The highest courts of at least two States have held, and this Court has intimated, that it would be unconstitutional to convict an insane person, in violation of common law principles, for conduct caused by his insanity. *State v. Strasburg*, 60 Wash. 106, 110 Pac, 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *Robinson v. California*, 370 U.S. 660 (1962). The Courts of Appeals in the *Driver* and *Easter* cases, and recently other courts, have applied this reasoning in reversing the convictions of chronic alcoholics for public intoxication.

Judicial inquiry should focus on whether the individual could control his behavior. The precise etiology of a disease is not relevant to the ultimate issue of criminal respon-

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higher, stating that there were a great many alcoholics who had serious emotional and psychological difficulties of which their drinking was symptomatic. Some A.A. people, on the other hand, feel that more than 95 percent of alcoholics can recover adequately under group psychotherapy of A.A., leaving 5 percent who might fit into the category of psychiatric, psychological, or emotionally-disturbed people." Gavin, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 94, 95-96 (June 1962).

At least three courts have held that alcoholism is not *per se* insanity. *United States v. Malafronte*, 357 F.2d 629, 632 n.8 (2d Cir. 1966); *United States v. MacLeod*, 83 F. Supp. 372 (E.D. Pa. 1943); *District of Columbia v. Phillips*, Crim. No. DC-855-67 (D.C. Ct. Gen. Sess., April 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967) (daily ed.).

sibility.[61] The cause and mechanism of many diseases, including alcoholism, remains unclear. Uncertainty about the cause of a disease, however, does not mean that its recognized effects, particularly the victim's loss of the ability to control his conduct, are without legal significance.

The delay in widespread recognition of alcoholism as a serious disabling disease[62] only underscores the fact that the unconscionable punishment of alcoholics for public intoxication has continued far too long. It provides no justification for perpetuating it.

B. *Criminal Punishment of Alcoholics Is Now Generally Recognized by Informed Authorities as Cruel and Irrational.*

Long in advance of the *Driver* and *Easter* decisions, and before the U.S. and D.C. Crime Commissions and the Cooperative Commission on the Study of Alcoholism urged that the prosecution of inebriates and alcoholics be abandoned, all segments of the community had condemned the

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[61] The Court of Appeals for the District of Columbia Circuit unanimously so held in *Easter*, 361 F.2d at 52.

[62] In 1778 Dr. Thomas Trotter, an Edinburg physician, commented on the reluctance to recognize chronic alcoholism as a disease:

> "Mankind, ever in pursuit of pleasure, have reluctantly admitted into the catalogue of their diseases, those evils which were the immediate offspring of their luxuries. Such a reserve is indeed natural to the human mind; for of all deviations from the paths of duty, there are none that so forcibly impeach their pretentions to the character of rational beings as the inordinate use of spiritous liquors. Hence, in writing of medicine, we find drunkenness only cursorily mentioned among the powers that injure health, while the mode of action is entirely neglected and left unexplained."

Trotter, *Essay, Medical Philosophical and Chemical, on Drunkenness* (1778), quoted in McCarthy, *Alcoholism: Attitudes and Attacks, 1775-1935*, 315 The Annals of the American Academy of Political and Social Science 12 (1958).

practice.[63] Indeed, one searches in vain for any responsible or informed defense of this practice.

In 1962 Judge Murtagh, then Chief City Magistrate of New York, wrote:

> "Today we recoil at the manner in which past generations used burning and whipping to curb crime. Is it not likely that future generations will read of our imprisonment of drunken derelicts with a similar sense of shock and outrage?" Murtagh, *The Derelicts of Skid Row*, Atlantic Monthly, March 1962, at 77, 81.

Three years earlier Judge Johns of the Denver Superior Court charged:

> "that the law as we know it in its rough form—that of a proscribed punishment for a violative act—has broken down and is not functional. The punitive approach to the person afflicted with the disease of alcoholism is as archaic as the medieval outlook that the community once had with respect to insanity, tuberculosis, and leprosy." Johns, *A Practical Approach*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Conference of Municipal Judges* 52 (October 1959).

The Conference which Judge Johns addressed concluded that "the alcoholic is a compulsive offender who should be helped by the Court rather than punished," and that "a judge should not be required to incarcerate persons guilty of no offense other than their affliction with the illness of alcoholism." *Id.* at 90.

More recently, Presiding Justice Bernard Botein of the New York State Supreme Court, Appellate Division, criticized the criminal handling of chronic alcoholics as a relic of medieval morality wholly inconsistent with modern concepts of medicine and criminal responsibility:

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[63] Additional supporting material is collected in Appendix G to this brief and in Appendices A and B to Judge Fahy's opinion in the *Easter* case, 361 F.2d at 56-60.

"The community's handling of the chronic drunk reveals the inhumanity and ineffectiveness of dealing with him as a criminal.

* * *

"Such obsolete social philosophy still persists, however, in the ob inate insistence on treating chronic alcoholism—a problem of human inadequacy—as one of crime. In this posture the chronic drunk cannot even muster the dubious dignity or command the pseudo-respect of being regarded as a dangerous criminal. He is treated as human refuse, to be swept off the streets periodically and into the courts, in what Austin MacCormick has termed a 'street cleaning operation'.

* * *

"I have no idea whether the ultimate procedures [for rehabilitation] will eventually save the city money or cost more than presently expended. I don't think we can make the choice on any such basis. A civilized community cannot stand by while the biographies of these people are written in interminable records of criminal convictions.

* * *

"Finally, and speaking as a judge, our courts should not serve as disposal centers for cleaning the streets of chronic drunks; nor should judges be constrained by present conditions to impose frequently repeated prison terms resulting in what is virtually a sentence to life imprisonment on the installment plan." Botein, *Speech to the Conference on the Handling of Offenders in the City of New York* 11-13, 16-17 (1965).

In light of these and many similar statements by correction officials, sociologists, physicians, judges, and other community leaders throughout the country, collected in Appendix G, repeated conviction of chronic alcoholics for public intoxication cannot be considered a "civilized" practice that conforms to "standards of decency that mark the progress of a maturing society." Such convictions undermine "the dignity of man." See *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

These prevailing views were reflected in the conclusions of the *Report of The President's Commission on Law Enforcement and Administration of Justice* (the "*U.S. Crime Commission Report*") which earlier this year pointed out:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U.S. Crime Commission Report* at 235.

The Commission therefore recommended that "Drunkenness should not in itself be a criminal offense." *Id.* at 236.

The conclusions announced just a few weeks before by the *Report of the President's Commission on Crime in the District of Columbia* (the "*D.C. Crime Commission Report*") were more strongly stated. The D.C. Crime Commission stated that 44,218 arrests were made in 1965 for violations of the District of Columbia public intoxication law. "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474.

> "The practice of dealing with destitute public inebriates as criminals has proved to be expensive, burdensome and futile. * * *
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> "Moreover, criminal procedures did not serve as a deterrent. * * *
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> "The resort to criminal sanctions has completely failed. Periodic commitments to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness." *Id.* at 485-486.

The Commission concluded, at 490, that "The bankruptcy of the law enforcement approach to public intoxication is clear":

> "For these unfortunate people, simple humanity demands that we stop treating them as criminals and

> provide voluntary supportive services and residential facilities so that they can survive in a decent manner." *Id.* at 501.

It therefore recommended that drunkenness alone no longer be a criminal offense in the District of Columbia. *Id.* at 496-497.

Only last month the Cooperative Commission on the Study of Alcoholism issued its *Report to the Nation on Alcohol Problems* (Plaut ed. 1967), reflecting five years of intensive work. The Cooperative Commission termed the repeated arrest of derelict alcoholics for public intoxication "particularly inhumane." *Id.* at 22.

> "Heart disease, cancer, schizophrenia, and delinquency are not completely understood either, yet a community which responded to these conditions as it responds to problem drinking would be considered medieval and a national disgrace." *Id.* at 37.

It concluded that "The infamous 'drunk tanks' found in almost all city jails are instances of barbaric mistreatment." *Id.* at 61.

Chapter 5 of the Cooperative Commission Report, entitled "The Special Problem of Public Drunkenness," flatly condemns the present system:

> "The traditional handling by the police, the court, and jail systems of the very large number of persons found drunk on the streets is inhuman as well as ineffective. There is general agreement that the current 'revolving door' system of repeated arrests and jailings does not alter the drinking behavior of any significant number of problem drinkers, and that it is not effective either as a deterrent or treatment. Many questions have been and are being raised about the constitutionality of treating such persons as criminals. If a man's drunkenness is part of his illness – and thus a non-voluntary act – he should be treated as a sick person and not as a criminal. Clearly it is not a crime to suffer from alcoholism, a characteristic of which is the inability to control one's drinking;

thus it seems bizarre, inappropriate, and unconstitutional to punish an individual for being intoxicated.

"In addition, the present handling of public drunkenness offenders is often demoralizing to the police, judicial, and jail personnel. It is an immense economic drain – in terms of men, time, and space – on these agencies. Furthermore, it seriously undermines the professional character of the work of policemen, judges, district attorneys, and others, and often makes a mockery of the American judicial system. In most courts the average time spent by the judge in the 'trial' and sentencing of each public drunkenness offender probably is less than three minutes. This system of handling defendants undoubtedly violates the traditional American conception of 'due process of law.'

"PUBLIC DRUNKENNESS SHOULD BE APPROACHED AS A MEDICAL-SOCIAL RATHER THAN AS A LEGAL-CRIMINAL PROBLEM

"There is an immediate need to find substitutes for the current legal handling of public drunkenness. Police, judges, and prison officials generally do not view public drunkenness offenders as criminals, but they are trapped in the present system by the absence of any alternatives. Since the public wants intoxicated persons removed from the streets, other means of accomplishing this are needed." *Id.* at 110-111.

Measured by contemporary national standards, therefore, Appellant's conviction must be adjudged "cruel and unusual" and reversed.

III. Reversal Is Compelled by *Robinson v. California*

In *Robinson v. California*, 370 U.S. 660 (1962), this Court struck down as unconstitutional on its face a California law making it a crime to be addicted to narcotics. Amici do not contend that Article 477 of the Texas Penal Code is uncon-

stitutional on its face. Amici do contend that, as now interpreted to apply to involuntary intoxication by a chronic alcoholic, it is unconstitutional as thus applied. The fact that Article 477 punishes a symptom (intoxication) rather than the disease by name (chronic alcoholism) affords no basis for distinguishing *Robinson*.

This Court concluded in *Robinson* that California's "addiction" statute imposed "cruel and unusual punishment" in violation of the Eighth and therefore the Fourteenth Amendment. The Court noted that mental illness, leprosy, and venereal diseases – all of which were once regarded as criminal – could no longer be punished as crimes. The State of California had admitted that a narcotic addict is "in a state of mental and physical illness," and the Court concluded that narcotic addiction is in the "same category" as these other diseases and therefore held the statute unconstitutional. 370 U.S. at 666-667.

The full impact of *Robinson* emerges clearly from the separate opinions of three Justices.[64] Mr. Justice Douglas in concurring asserted that an addict "is under compulsions not capable of management without outside help," 370 U.S. at 671, and concluded:

> "This prosecution has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than with providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U.S. at 677-678.

Mr. Justice Clark interpreted the California statute as applying only to a "volitional addict" who had not yet lost self-control over use of narcotics. In his view, the law did not apply to "involuntary addicts." His disagreement with the majority rested on this narrow reading of the statute.

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[64] Mr. Justice Harlan concurred on grounds not relevant here. 370 U.S. at 678.

He did not dispute its conclusion that the punishment of involuntary addiction is unconstitutional. 370 U.S. at 679-85.

Mr. Justice White construed the California statute as punishing repeated or habitual *use* of narcotics rather than the status of addiction. Viewing use and addiction as inseparable, he feared that the majority opinion would also prohibit criminal punishment for the use of narcotics. Justice White concluded that the California statute applied only to an "incipient" or "voluntary" addict but admitted that, if it were construed to punish the involuntary addict, "I would have other thoughts about this case." 370 U.S. at 685-689.

In short, disagreement centered upon the proper interpretation of the California statute. No Justice disputed the basic constitutional principle, applied by the majority, that the Eighth Amendment prohibits conviction of a sick person who is acting under a compulsion and has lost the power of self-control. This, of course, is precisely the situation presented by this case.[65]

Concededly, the majority in *Robinson* interpreted the California statute as punishing only the condition of addiction. It did not have to decide whether the Eighth Amendment proscribes criminal punishment of a person who involuntarily exhibits a symptom of that condition, *e.g.*, who repeatedly uses narcotics. The majority opinion makes clear, however, that to punish the symptoms of a disease would likewise be unconstitutional. Although recognizing the broad powers of the States to combat the narcotic traffic, 370 U.S. at 664, the majority nowhere stated that a State could convict an

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[65] The brief of the State of California in *Robinson* conceded that alcoholism is an illness:

> "'Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. *So is an alcoholic.*'" 370 U.S. at 667 n.8 (Emphasis added.)

addict whose procurement, possession, or use of narcotics was caused by his addiction. Its only reference to narcotics addicts is a statement that the States might provide for civil treatment of addicts. 370 U.S. at 665. Nor did the majority seek to dispell Justice White's concern that its decision would preclude conviction of narcotics addicts for procurement, possession, or use of drugs.[66] 370 U.S. at 688. One commentator has reached the same conclusion. *The Supreme Court, 1961 Term,* 76 Harv. L. Rev. 54, 146 (1962).

Moreover, Appellant is being punished as much for his continuing condition of *alcoholism* as for his public intoxication on any given occasion. The court below viewed his intoxication on December 19, 1966 as a single, isolated incident. But this view is neither required by judicial precedent nor supportable in fact.

In *O'Neil v. Vermont*, 144 U.S. 323 (1892), the appellant had been convicted on 307 separate charges of selling liquor

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[66] One distinction between the use of narcotics and the consumption of alcohol is also important. Non-medicinal use of narcotics is illegal throughout the United States. Consumption of alcohol, on the other hand, is legal (with certain restrictions) in almost every jurisdiction and the *abstainer* is often a social outcast. One can quite easily become a chronic alcoholic without violating the law, but only rarely does an addict become addicted solely as a result of legal (*i.e.*, medical) use of narcotics. Nor is the means by which a chronic alcoholic becomes addicted to alcohol generally considered reprehensible:

> "The custom of drinking, one of America's leading social forms, has become a habit in both leisure and business hours. Acceptance of daily low or high alcoholic intake determines, in part, the exposure to the risk of alcoholism. For the person who attempts to abstain where drinking is the rule, social pressure stands ready to challenge will power and determination. Being sober while others drink is both difficult and perturbing. The abstainer cannot help feeling different and uneasy. If he succeeds in not conforming to the drinking in progress, a greater discomfort awaits him: he is no longer welcome because he does not seem 'sociable' anymore." Roche Laboratories, *Aspects of Alcoholism* 31 (1963).

without a license. A fine of $20 for each offense had been imposed or, in lieu thereof, a sentence of three days in jail for each $1 of fine – a total of $6,140 in fines or 19,914 days (over 54 years) in jail. The Court majority did not reach the merits of the appellant's constitutional claim for it held that the Eighth Amendment was not applicable to the States – a holding repudiated by *Robinson*. Justices Field, Harlan, and Brewer in dissent argued that the appellant's aggregate punishment was unconstitutional. They realistically viewed his sentence as a whole, rather than fragmenting it. This Court cannot ignore the painful fact that Appellant is in effect serving a continuing periodically renewed sentence for his *alcoholism*, under which he has already spent substantial time in jail.

Appellant's illness cannot be separated from its symptoms.[67] Those familiar with chronic alcoholism – correctional officials, educators, physicians, and judges – frankly concede that the law today punishes *chronic alcoholism* as a crime. The late Donald Clemmer, former Chairman and Director of the District of Columbia Department of Corrections, informed Congress in 1947 that about 63 percent of the jail commitments that fiscal year were, in his words, "for alco-

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[67] That chronic alcoholism cannot in law or fact be separated from intoxication was recently recognized in a labor arbitration award:

> "Problem drinkers do not deliberately or willfully become drunk. They are compulsive drinkers and the control of drinking is beyond their reach. These people are alcoholics and since the Daily News recognizes it as a disease, one must recognize that symptomatic in this type of disease is the failure of the individual to voluntarily control his drinking. An alcoholic drinks because he has to, not because he wants to. No employee deliberately drinks so he can lose his job. In other words, he does not go out of his way to drink in order to get fired. It is a compulsion, not a willful act." *News Syndicate Co., Inc.*, 44 L.A. 308, 311 (1964).

holism."[68] In the House debates on the 1947 act to provide treatment for alcoholics in the District of Columbia, Congressman Miller noted that in the District "there are a great many arrests for alcoholism."[69] Mr. George W. Randall, Director of the North Carolina Department of Prisons, described the petitioner in the *Driver* case as one of the "unfortunates whose only offense is succumbing publicly to the disease of alcoholism." 356 F.2d at 765.

Dr. David Pittman, Professor of Sociology at Washington University in St. Louis, has reported that "America continues to clutter its courts and jails with individuals whose 'crime' is a physical and social illness."[70] The former Chairman of the American Medical Association's Committee on Alcoholism, Dr. Marvin Block, once warned that "One cannot legislate against a disease" and emphasized "the importance of regarding alcoholism as an illness rather than a violation of the law."[71] The *Report of the Committee on Prisons, Probation, and Parole in the District of Columbia* 131 (April 1957) emphasized that "the real judicial concern" should be "not a specific offense of intoxication, but the chronic condition of human deterioration." The U.S. and D.C. Crime Commissions and the Cooperative Commission likewise concluded that the real problem is one of alcoholism, not merely public intoxication.

These experts, and many others, recognize Appellant's convictions for what they really are—punishment for his chronic

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[68] "Rehabilitation of Alcoholics," *Hearings Before the Subcommittee on Health; Education, Recreation of the Committee on the District of Columbia, House of Representatives,* 80th Cong., 1st Sess., on H.R. 496, at 8 (1947).

[69] 93 Cong. Rec. 3357 (1947).

[70] Pittman, *The Chronic Drunkenness Offender: An Overview,* in *Proceedings of the Department of Health, Education and Welfare Conference on the Court and the Chronic Inebriate* 6, 14 (April 1965).

[71] Block, *Alcoholism: Its Facets and Phases* 60, 283-284 (1965).

alcoholism. Neither this Court, nor any other, can ignore the fact. The involuntary exhibition of the symptoms of a disease is no more blameworthy than having the disease. It is as intolerable to punish the one as the other.

No one can doubt that it would be unconstitutional to punish a person for having a common cold or, accordingly, for sneezing in public. On the same basis, it would be unconstitutional to make epilepsy a crime, as the Supreme Court recognized in *Robinson*, or to imprison an epileptic for suffering a fit in public. If chronic alcoholism cannot be made criminal because it is a disease, chronic alcoholics cannot be punished for succumbing to it in public.

IV. The Rationale of *Driver* v. *Hinnant* and *Easter* v. *District of Columbia* Should Be Followed in This Case.

The criminal statutes under which Joe B. Driver and DeWitt Easter were convicted are indistinguishable from Article 477 of the Texas Penal Code. The unanimous decisions of the Fourth and District of Columbia Circuits accordingly warrant careful attention.

A. *The Driver Case*[72]

Prior to his convictions in the Durham County Court for being drunk in public[73] on December 18 and 19, 1963, Joe B. Driver had been arrested more than 200 times for public intoxication or related offenses. He had spent 25 of the last 36 years of his life in jail. Because he had been convicted on similar charges three times during 1963, Driver was sen-

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[72] A more complete summary of the facts of this case appears in Appendix B.

[73] Section 14-335, N.C. Gen. Stat., provides:

> "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting . . . he shall be guilty of a misdemeanor . . . ."

tenced to the statutory maximum of 2 years in jail. The North Carolina Supreme Court affirmed, rejecting his claim that his convictions and sentence violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

Driver later filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. That court found that Driver was a "chronic alcoholic" in that he had lost self-control with respect to the use of alcoholic beverages and was in need of medical and rehabilitative treatment, but it concluded that his conviction and sentence did not contravene the Eighth Amendment. *Driver v. Hinnant*, 243 F. Supp. 95 (E.D.N.C. 1965).

The District Court's judgment was unanimously reversed by the United States Court of Appeals for the Fourth Circuit. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966). Accepting the finding that Driver was a chronic alcoholic, the Court of Appeals ruled that he could not constitutionally be convicted for public intoxication since his "drunken public display [was] . . . involuntary as the result of disease." The court's holding is explained in the following paragraphs:

> "This addiction - chronic alcoholism - is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior'. Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, *there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine.*
>
> "Although his misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime. Morissette v. United States, 342

> U.S. 246, 250-52 (1952). Nor can his misbehavior be penalized as a transgression of a police regulation - malum prohibitum - necessitating no intent to do what it punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place defy the forbiddance." 356 F.2d at 764. (Emphasis added.)

The Court of Appeals concluded that *Robinson* "sustains, if not commands" its decision even though Driver was convicted for the "act" of being intoxicated in public and not for the "status" of being a chronic alcoholic.[74] 356 F.2d at 764-765.

B. *The Easter Case*[75]

DeWitt Easter was convicted for public intoxication on September 29, 1964.[76] A heavy drinker since the 1930's, Easter had progressively lost control of his life as a result of his inability to govern his consumption of alcohol. He had previously been arrested approximately 70 times for public intoxication, including 12 arrests in 1963.

The trial court ruled that whether Easter was a chronic alcoholic was irrelevant to his culpability, and held him guilty as charged. He received a suspended sentence of 90 days. On appeal, the District of Columbia Court of Appeals conceded that Easter's "chronic alcoholic condition" required

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[74] A different three-judge panel of the Fourth Circuit reiterated the *Driver* holding in *Lewis v. Celebrezze*, 359 F.2d 398, 399-400, (4th Cir. 1966).

[75] A more complete summary of the facts of this case appears in Appendix C.

[76] Section 25-128 of the D.C. Code provides:

> "No person shall in the District of Columbia . . . be drunk or intoxicated in any street, alley, park, or parking. . . ."

treatment, but held that alcoholism induced by persistent voluntary indulgence does not excuse public intoxication, relying on the old *Potts* case. Asserting that Easter had been convicted for the act of being intoxicated in public and not for the status of being a chronic alcoholic, the court also rejected the contention that his conviction violated the Eighth Amendment. *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, unanimously reversed Easter's conviction. All eight judges agreed that under common law principles Easter, a chronic alcoholic, could not be convicted for behavior that was the involuntary product of his disease. Four judges thus found it unnecessary to reach his constitutional argument. The remaining four judges, however, concluded in addition that his conviction for public intoxication contravened the Eighth Amendment:

> "We hold, therefore . . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and *to convict such a person of that crime would also offend the Eighth Amendment.*" 361 F.2d at 55. (Emphasis added.)

No judge disputed this conclusion.

C. *Other Recent Decisions*

Two other Courts of Appeals have indicated agreement with the *Driver* and *Easter* decisions.

In *Fultz v. United States*, 365 F.2d 404 (6th Cir. 1966), the Court of Appeals reviewed the conviction of an indigent defendant who had pled guilty to a charge of bank robbery and had been sentenced to 10 years' imprisonment. The defendant experienced delirium tremens for several days after his arrest. A mental examination disclosed that he "had a long history of periodic, severe alcoholism, and prolonged and immoderate use of drugs," but he was found competent to stand trial. After only 15 minutes' consultation his court-

appointed attorney entered a plea of guilty which the trial judge accepted without further inquiry.

The Court of Appeals held that the trial judge had acted improperly, describing *Driver* and *Easter* as "the recent leading cases holding that chronic alcoholism may be a defense to a charge of unlawful conduct, because of lack of responsibility on the part of one so afflicted." 365 F.2d at 407. It held that the guilty plea should not have been accepted without first investigating the circumstances under which it was made and determining that it was made voluntarily with an understanding of the nature of the charge.

In *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965), the Court of Appeals, accepting modern medical knowledge regarding alcoholism, held that a chronic alcoholic cannot be required to refrain from drinking as a condition of probation. Convicted for violating the Dyer Act, Sweeney was placed on probation on the condition that he "refrain from the use of alcoholic beverages in any form." Six months later Sweeney was arrested for violating this condition and ordered to begin serving his original sentence. He brought an action under 18 U.S.C. § 2255 contending that, because he was a chronic alcoholic, the condition was unreasonable and therefore that his probation had been unjustly revoked. The Court of Appeals accepted his contention:

> "It appears from the record that when probation was granted, the district court knew petitioner's history of chronic alcoholism, and had indications of its pathological nature. We think consequently the probation condition, under the facts of this case, would be unreasonable[2] as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition.

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[2] In Robinson v. State of California, 370 U.S. 660 (1962), the Supreme Court, in striking down a California statute which,

> as construed, made the 'status' of narcotic addiction a criminal offense, illustrated why, on the record before us, we think the probation condition could be unreasonable. . . ." 353 F.2d at 11. (Footnote in original.)

Under this same reasoning, the conviction of a chronic alcoholic for public intoxication is unconstitutionally unreasonable.[77]

Two intermediate appellate courts and one trial court in three States have recently followed the *Driver* and *Easter* decisions. In July 1967 the Superior Court of Fulton County, Georgia (which includes the City of Atlanta) reversed the conviction of a chronic alcoholic for his public intoxication, relying upon both common law and constitutional grounds. *Dunlap v. City of Atlanta*, Fulton County, Ga., Sup. Ct. No. B-29126 (July 17, 1967), reprinted in 113 Cong. Rec. H11089 (August 23, 1967) (daily ed.). In August the Pennsylvania Court of Common Pleas in Philadelphia, in ruling upon petitions for habeas corpus, held that "habitual intoxication is an illness, and as such may not constitutionally be made a criminal offense." *Lee v. Hendrick*, Pa. Common Pleas Ct. (Phil.) No. H.C.-0075 (August 31, 1967) digested in 1 BNA Crim. L. Reptr. 2364 (September 20, 1967), reprinted in 113 Cong. Rec. H15368 (November 15, 1967) (daily ed.). And in October the Circuit Court for Montgomery County, Maryland, reversed the conviction of a chronic alcoholic for public intoxication, holding:

> "1. That on a charge of public intoxication under Article 27, Section 123, a defendant may assert chronic alcoholism as a defense and introduce evidence in support of that defense . . . .
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[77] See also *Gibbs v. Blackwell*, 354 F.2d 469, 471 (5th Cir. 1965), in which the Court of Appeals ruled that the allegation that a prisoner "lost over seven years' time on parole because he became drunk on three occasions . . . raises serious constitutional questions" and remanded the case for development of a full record.

> "5. That to incarcerate or otherwise punish a chronic alcoholic for being in a state of intoxication in a public place constitutes cruel and unusual punishment and is in violation of the Eighth Amendment . . . ."

State v. Ricketts, Montgomery County, Md., Cir. Ct. Crim., No. 8787 (October 25, 1967), reprinted in 113 Cong. Rec. S15974 (November 7, 1967) (daily ed.).

The law in California appears to be unsettled. In the *Budd* case, the ruling of the Municipal Court for the Oakland-Piedmont Judicial District that alcoholism is not a defense to a charge of public intoxication was affirmed without opinion by the Appellate Department of the Superior Court. The California Supreme Court and this Court denied petitions for a writ of certiorari. *Budd v. California*, 385 U.S. 909 (1966). While the petition was pending in this Court, however, the Municipal Court for the Los Angeles Judicial District ruled that the Constitution requires acquittal of a chronic alcoholic charged with public intoxication. *State v. Dobney*, Los Ang. Mun. Ct. No. D475555 (May 16, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.), *rev'd on other grounds*, Los Ang. Super. Ct. App. Div. No. CRA 6963 (October 14, 1966). The California Supreme Court has not yet confronted the issue.

Similar cases in at least five other jurisdictions are at various stages of appeal.[78]

In *State v. Freiberg*, 35 Wis. 2d 480, 151 N.W.2d 1 (1967), alcoholism was recognized as a disabling disease in the context of a different criminal charge. The defendant was charged with failure to support his child and claimed in de-

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[78] *Seattle v. Hill*, Wash. Sup. Ct. No. 39050, argued on March 28, 1967; *People v. Hoy*, 3 Mich. App. 366, 143 N.W.2d 577 (Ct. App. 1966), on appeal, Mich. Sup. Ct. No. 51563, argued on November 7, 1967; *Commonwealth v. Owens*, Middlesex, Mass., Super. Ct. No. 74393; *State v. Fearon*, Minn. Sup. Ct.; *Columbus v. Kelley*, Ohio 10th Dist. Ct. App., argued on October 30, 1967.

fense that "he is a chronic alcoholic and that this condition is an illness or a disease that prevented him from keeping any employment and from supporting his family." The court agreed this would be a valid defense:

> "If sufficient facts were established to show that the defendant was an alcoholic in a medical sense, and that such alcoholism prevented the defendant from working, we would conclude that the defendant lacked the physical capacity to work." 35 Wis. 2d at 484, 151 N.W.2d at 3.

The defendant was convicted, however, when he failed to present competent testimony to establish his defense.

Finally, in two recent civil cases alcoholism has been recognized as a disabling disease. In *Lewis v. Celebrezze*, 359 F.2d 398 (4th Cir. 1966), an action brought to obtain disability benefits under the Social Security Act, the court held that:

> "where chronic alcoholism alone or in combination with other causes, is shown to have resulted in a medically determinable disability, rendering gainful employment impossible, recovery of benefits under the Act ought not be barred on account of the origin of the disability." 359 F.2d at 400.

Lewis failed to make the required showing. The plaintiff in *Schompert v. Celebrezze*, W.D.N.Y. Civil No. 10,937 (May 24, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.), however, was able to establish a clear disability resulting from his alcoholism and prevailed in his action for payments under the Social Security Act.

D. *Legal Commentators Have Approved of the Driver and Easter Decisions*

The President of the American Bar Association recently noted that:

> "Francis A. Allen, Dean of the University of Michigan Law School, makes the point that the criminal law should not be relied upon to perform social

> services, such as dealing with the problem of habitual drunkards."

He stated that the *Robinson, Driver,* and *Easter* decisions "dramatize the need for new approaches in dealing with such problems."[79]

The Executive Director of the North American Judges Association asked rhetorically:[80]

> "Weren't police hired to protect life and property, rather than to move drunks in and out of courts and jails?"

He answered that:

> "any such neglect was accentuated and perpetuated by an archaic legal system that permits such cruel and unusual punishment of sick persons to flourish into the major item of business for police and courts."

After describing the *Driver* and *Easter* decisions, he concluded by calling upon the Bar to avoid "the aversion to controversy and the restraint of social acceptability that hamper pioneering probes" and "to provide the leadership that the rest of society expects from the legal profession" in dealing with "this grave sociolegal problem of alcoholism."[81]

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[79] Marden & Silverstein, *The Growing Importance of Criminal Law to the Legal Profession,* 53 A.B.A.J. 511, 514 (June 1967).

[80] Logan, *May A Man Be Punished Because He Is Ill?,* 52 A.B.A.J. 932 (October 1966).

[81] *Id.* at 937. Judge C. Raymond Judice, President of the Texas Association of Municipal Judges, has pointed out the magnitude of the public drunkenness problem in Houston and suggested that treatment programs are urgently needed. Judice, *Public Intoxication,* 30 Tex. Bar J. 341 (May 1967).

The *Driver* and *Easter* cases have provoked a multitude of law review comments in the past two years.[82] These comments applaud the results reached in those cases as just and humane.[83] Although most commentators recognize that the transition from criminal to public health handling of alcoholism will create initial problems, they uniformly emphasize that this change is imperative.

V. Reversal of the Lower Court's Decision Will Benefit the Nation

The lower court's decision is inconsistent with sound social policy. Reversal will inevitably bring about a transfer of responsibility for public intoxication and chronic alcoholism from law enforcement officials to public health agencies, a result that is long overdue. Affirmance of Appellant's conviction would undermine the progress that has been made

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[82]Case Note, 19 Ala. L.Rev. 183 (1966); Case Note, 16 Am. Univ. L.Rev. 295 (1967); Casenote, 8 Ariz. L.Rev. 351 (1967); 20 Ark L. Rev. 365 (1967); Case Comment, 46 B.U.L.Rev. 409 (1966); Recent Decision, 2 Brook. L.Rev. 324 (1967); Case Note, 15 Cath. U. L.Rev. 259 (1966); Note, 36 U.Cin.L.Rev. 258 (1967); 2 Colum. J. of Law & Soc. Prob. 109 (1966); Note, 52 Corn. L.Q. 470 (1967); Case Note, 16 DePaul L.Rev. 493 (1967); Note, 1966 Duke L.J. 545 (1966); Recent Decision, 54 Geo. L.J. 1422 (1966); Comment, 4 Hous. L.Rev. 276 (1966); Recent Development, 13 How. L.J. 203 (1967); Recent Decision, 1966 U. Ill. L.Forum 767 (1966); Note, 52 Ia. L.Rev. 492 (1966); Recent Case, 55 Ky. L.J. 201 (1966); Note, 27 La. L.Rev. 340 (1967); Note, 44 N.Car. L.Rev. 818 (1966); Recent Case, 43 N.D. L.Rev. 551 (1967); Comment, 18 S.Car. L.Rev. 504 (1966); Note, 12 S.Dak. L.Rev. 142 (1967); Comment, 11 St. Lou. L.J. 250 (1967); Note, 41 Tul. L. Rev. 140 (1966); Note, 3 Tulsa L.J. 175 (1966); Recent Development, 11 Vill. L.Rev. 861 (1966); Case Comment, 23 Wash. & Lee L.Rev. 402 (1966); Note, 12 Wayne L.Rev. 879 (1966); Current Decision, 7 Wm. & Mary L.Rev. 394 (1966).

[83]Representative comments from these articles are collected in Appendix G.

during the past two years following the *Driver* and *Easter* decisions.

Recognition by this Court of alcoholism as a defense to public intoxication will not stifle the legitimate interest of the States and localities in protecting their citizens against harm. Indeed, by providing proper treatment for chronic alcoholics the States in the long run will protect these interests far more effectively than at present.

A. *Health Services to Alcoholics Will Be Improved.*

Understanding of alcoholism as an illness began in this country when Dr. Benjamin Rush, a signer of the Declaration of Independence and physician general to the Colonial Army during the Revolution, published *An Inquiry Into the Effects of Ardent Spirits on the Human Body and Mind* in 1784. Since that time many prominent physicians have called for the recognition of alcoholism as an illness rather than a criminal offense.[84] Until the court decisions in 1966, however, their pleas were largely ignored.

For example, in 1947 Congress enacted what was then considered a model of progressive civil legislation to promote the rehabilitation of alcoholics in the District of Columbia.[85] Unfortunately, it did not at the same time repeal the local statutory provisions prohibiting public intoxication.[86] As a

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[84] See, *e.g., JAMA 75 Years Ago: Inebriety—Illness or Crime?* 202 J. Am. Med. Assn 23 (October 30, 1967), showing that in 1892 the British Medical Journal and the Journal of the American Medical Association concluded that:

> "... this 'National Folly' of arresting and sending to jail these poor victims of inebriety should cease. A new departure is demanded, and they should be recognized as diseased and sent to hospitals, under the care of physicians."

[85] Section 24-501 *et seq.* of the D.C. Code, 61 Stat. 744 (1947).

[86] Section 25-128 of the D.C. Code.

result, from 1947 through March of last year chronic alcoholics in the District of Columbia, as elsewhere, continued to be arrested, prosecuted and convicted for intoxication. The civil legislation calling for medical treatment and rehabilitation of alcoholics remained a dead letter.

During the intervening twenty years numerous citizen groups attempted without success to obtain implementation of the rehabilitation law.[87] The Subcommittee on Alcoholic Problems of the American Bar Association Committee for the Improvement in the Administration of Justice in the District of Columbia issued a report in 1956 recommending repeal of the law prohibiting public intoxication. In April 1957 a group of prominent public officials appointed by the D.C. Board of Commissioners issued a *Report on Prisons, Probation and Parole in the District of Columbia* in which they recommended immediate and full implementation of the 1947 Act. The Council on Rehabilitation of the area's medical societies issued a report in January 1960 which ranked resources for the treatment of alcoholics second among the four problems of greatest concern. Later that year the Washington D.C. Area Council on Alcoholism invited community leaders to a workshop which recommended that public intoxication be eliminated as a criminal offense. A D.C. Department of Public Health study issued in 1962 found that the need for adequate alcoholism treatment was mentioned in five of seven reports made between 1946 and 1961.

By 1964 it had become obvious that these reports and recommendations had been futile. Litigation was then instituted which culminated in the *Easter* decision. Yet even while the *Easter* case was in the courts, no official efforts were

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[87]For a detailed and documented review of this history see "A History of the Problems of Drunkenness and Alcoholism in the District of Columbia," in "Alcoholism," *Hearings before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143, at 40-59 (1967); *D.C. Crime Commission Report* 474-503.

made to improve treatment for alcoholics in the District of Columbia.

The *Easter* decision was handed down on March 31, 1966. The judges of the Court of General Sessions soon concluded that they were obligated to raise, *sua sponte*, the defense of alcoholism for virtually every unrepresented indigent charged with drunkenness,[88] and almost all were acquitted and referred for treatment. There have been greater improvements in medical services for alcoholics in the District of Columbia in the succeeding 20 months than in the previous 100 years.

The D.C. Crime Commission, recognizing the challenge of the *Easter* decision, made broad recommendations for removing the entire problem of public intoxication from the criminal system and transferring it to public health agencies.[89] Bills introduced in Congress to implement those recommendations[90] have already been the subject of hearings in the House.[91] While adequate medical treatment for alcoholics is not yet available in the District of Columbia, it is on the way. All of these changes are the direct result of the *Easter* decision.

The reports of the U.S. Crime Commission, the D.C. Crime Commission, and the Cooperative Commission on the Study of Alcoholism — all of which recommend repeal of public drunkenness statutes[92] — are indispensible blue-

[88] *District of Columbia v. Walters*, D.C. Ct. Gen. Sess. Crim. No. DC-1850-66 (August 16, 1966), reprinted in 112 Cong. Rec. 22716, (September 22, 1966) (daily ed.); *D.C. Crime Commission Report* 979 n.71.

[89] *D.C. Crime Commission Report* 474-503.

[90] H.R. 6143, Title VII of H.R. 6326, S. 1740, and S. 1515 90th Cong., 1st Sess. (1967).

[91] "Alcoholism," *Hearings before Subcommittee No. 3 of the Committee of the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143 (1967).

[92] *U.S. Crime Commission Report* 235-236; *D.C. Crime Commission Report* 496-497, 502; *Cooperative Commission Report* 111.

prints for the future. But if Appellant's conviction is not reversed, these blueprints will never be used. They will remain on the shelves with the many hopeful reports and recommendations issued in the District of Columbia between 1947 and 1966.

Each of these three recent reports explicitly recognized the central importance of the courts in stimulating reform in the handling of drunkenness and alcoholism. The *U.S. Crime Commission Report* at 236 stated the *Easter* and *Driver* decisions underlined "the importance of developing an alternative to treating drunkenness within the criminal system." The *D.C. Crime Commission Report* at 474-501 in effect chronicles the beneficial results of the *Easter* decision. The *Cooperative Commission Report* at 61 and 73 states that the *Easter* and *Driver* decisions "will perhaps force a re-evaluation" of handling intoxication and alcoholism as criminal,[93] and predicted:

> "If these decisions become applicable throughout the United States there are likely to be major changes in the medical care provided to those arrested for public drunkenness."

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[93] See, *e.g.*, N.Y. State Bar Assn, *Report of the Committee on Public Health* 2, 4 (December 31, 1966), which calls for "prompt legislative action in New York to forestall a similar decision in this jurisdiction holding our present methods of handling the alcoholic under arrest unconstitutional under the rule laid down in *Driver* and *Easter:*

> "The *Driver* and *Easter* decisions are in line with the moral precept that alcoholics, like the insane and the leper, should no longer be treated as criminals. The decisions are praiseworthy for the following reasons: (1) They will force the creation of non-penal facilities for the detoxification, treatment, and lodging of chronic alcoholics. (2) They will help remove the moral stigma from alcoholism by recognizing it as an illness. (3) They will prevent the unequal application of the law as between the poor and the rich since, in practice, public intoxication laws are generally invoked only against homeless and indigent alcoholics."

The court decisions have already resulted in the St. Louis Detoxification Center, the only new innovation in the handling of public inebriates in 100 years. See U.S. Crime Commission, *Task Force Report: Drunkenness* App. C at 50 (1967).

Conversely, any prospect of such changes would be eliminated if Appellant's conviction were not reversed.

The record in this case contains insufficient information to permit delineation of the proper bounds of civil commitment for treatment of alcoholics, and disposition of Appellant's appeal does not require the Court to reach or resolve this issue. The U.S. and the D.C. Crime Commissions both concluded that voluntary treatment is effective and that involuntary commitment is unnecessary and, if an alcoholic does not endanger the safety of others, perhaps unconstitutional.[94] Any questions that may arise in the future should be resolved when presented in the context of a specific case.

Reversal of the lower Court's decision will, of course, produce short-term dislocations. These would occur, however, whenever society decides to begin treating alcoholism as an illness rather than as a crime. Experience demonstrates that such crises can be overcome, and that temporary inconvenience is but a small price to pay for the long-term benefits at stake.

B. *Reversal of Appellant's Conviction Will Improve Law Enforcement and Administration of Justice.*

The U.S. and D.C. Crime Commissions have pointed out that the States and localities are expending a grossly excessive amount of law enforcement resources in dealing with intoxication and alcoholism – problems that should be the responsibility of public health agencies. Some 30 percent of all arrests and an even larger percentage of commitments to penal institutions are for nothing more than drunkenness.[95]

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[94] *U.S. Crime Commission Report* 236; *D.C. Crime Commission Report* 499. See also *Cooperative Commission Report 112.*

[95] *U.S. Crime Commission Report* 233-234; *D.C. Crime Commission Report* 474-475.

The strain upon the judicial system is equally great. In order to process derelict inebriates through the courts as rapidly as possible, the U.S. and D.C. Crime Commissions found, the ordinary safeguards of "due process of law" are largely ignored.[96]

Reversal of the lower court's decision would produce two direct benefits to law enforcement and administration of justice. It would free the police to concentrate upon protection of the public from serious crime, at a time of growing public concern about a mounting crime rate. Reversal would also relieve court congestion, particularly in the cities, and thus permit greater time for proper dispensation of justice. With court backlogs at an all-time high and respect for legal processes declining, this would be a welcome result.

Reversal of Appellant's conviction would not open the "floodgates of crime." The crime with which Appellant is charged – public intoxication – is a symptom of all chronic alcoholics. To establish the defense of lack of criminal responsibility to a charge of public intoxication, proof that the defendant is a chronic alcoholic suffices. Murder, rape, assault, larceny, and embezzlement, however, are *not* symptomatic of chronic alcoholism. Indeed, chronic alcoholics are typically passive and non-belligerent.[97]

The only unlawful conduct with which Appellant was charged is, of course, public intoxication. If chronic alcoholism were raised as a defense to excuse *other* conduct in

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[96] *U.S. Crime Commission Report* 234-235; *D.C. Crime Commission Report* 478-479.

[97] See, *e.g.*, Botein, *Speech to the Conference on the Handling of Offenders in the City of New York* 11-17 (January 1965); Murtagh, *The Derelicts of Skid Row*, Atlantic Monthly, March, 1962, p. 77; Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 42, 51-52, 138 (1958); *Report of the Committee on Prisons, Probation and Parole in the District of Columbia* 86, 99 (April 1957).

a future case, mere proof of the illness would not be sufficient to sustain the defense. The defendant would at least have to establish, first, that he was a chronic alcoholic; second, that he was intoxicated to such an extent that he was unable to control his behavior; and third, that his behavior resulted solely from his intoxication.[98] His guilt or innocence would then be a question for the trier of fact.[99] If acquitted and found to be a threat to the safety of others he presumably could be civilly committed for appropriate treatment.

Recognition of chronic alcoholism as a defense could undoubtedly raise difficult problems of proof and judgment. They arise now whenever the insanity defense is invoked, but they provide no reason for denying justice to Appellant.

Since the *Pike* case in 1869 alcoholism has been available as a defense to all crimes in the State of New Hampshire, which is not renowned as a haven for criminal alcoholics. Although some 5,000 individuals have been adjudicated chronic alcoholics in the District of Columbia since the *Easter* decision, to the knowledge of Amici none has asserted alcoholism as a defense to a serious crime.

It is not necessary in this case to determine precisely the effects of reversal upon the power of the police to handle inebriates. Certainly, no one can seriously dispute that the police have a right, if not a duty, to transport incapacitated citizens, including inebriates, to medical facilities for proper treatment and care. Disorderly conduct – whether by an intoxicated or a sober person, and whether by an alcoholic or non-alcoholic – that threatens harm to other persons

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[98] See, *e.g.*, *District of Columbia v. Phillips*, D.C. Ct. Gen. Sess. Crim. No. DC-855-67 (April 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967) (daily ed.), recognizing the applicability of *Easter* to disorderly conduct.

[99] For a more detailed discussion of the problems raised see Hutt & Merrill, *Is the Alcoholic Immune from Criminal Prosecution?*, 6 Mun. Ct. Rev. 5 (1966), reprinted in 25 Legal Aid Briefcase 70 (1966).

would, of course, warrant immediate arrest. Reversal of Appellant's conviction will therefore neither harm the alcoholic nor hinder the police in affording necessary protection to the public.

The States would remain free to regulate the distribution, purchase, and sale of intoxicating liquor within their borders. See, *e.g.*, *Edwards v. United States*, 206 F.2d 855 (10th Cir. 1953); *Hayes v. United States*, 112 F.2d 417 (10th Cir. 1940). The validity of legislation prohibiting the sale of alcoholic beverages to intoxicated persons would not be impaired. In short, the permissible range of State legislation for these valid purposes would remain unchanged.

The single objective of this case is to end criminal punishment of chronic alcoholics who are found intoxicated in public. Reversal of the lower court's decision will merely transfer this public health problem from the jails to more appropriate institutions.

CONCLUSION

For the reasons stated, Amici Curiae urge that the judgment of the court below be reversed.

Respectfully submitted,

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November 24, 1967

> * * * However, alcoholism must be regarded as within the purview of the medical practice. The Council on Mental Health, its Committee on Alcoholism, and the profession in general recognizes this syndrome of alcoholism as illness which justifiably should have the attention of physicians."

Recommendation for the Admission of Alcoholics to General Hospitals – Reaffirmation of the 1956 Statement, Report G of the Council on Medical Service to the AMA House of Delegates, adopted in November 1966.

> "[A]lcoholism is a chronic illness and. . . multiple hospital admissions under medical supervision may be essential to arresting the progress of the disease."

Concerning Responsibility of Psychiatrists and Other Physicians for Alcohol Problems, a position statement authorized by the Council of the American Psychiatric Association (February 1965), 122 Am. J. Psych. 454, 455 (October 1965):

> "It is urgent and imperative that psychiatrists and other physicians prepare themselves for their proper role in attacking alcohol problems on a national scale that the medical contribution may become far more telling than it has been in the past."

American Hospital Association, *Statement on Admission of Alcoholic Patients to the General Hospital,* 31 J. Am. Hosp. Assn 106 (December 1, 1957):

> "Alcoholism is a serious health problem. It falls within the scope of medical practice and it is often a medical emergency."

World Health Organization Expert Committee on Mental Health, *Report on the First Session of the Alcoholism Subcommittee*, Tech. Rep. Ser. No. 42, at 4 (September 1951):

> "The first point that the subcommittee wishes to emphasize in its report is the importance of alcoholism as a disease and a social problem. It appears to the members that this problem is one to.

> the prevention and treatment of which public-health services could make extensive contributions. They feel, however, that at present in many countries the public-health authorities have been slow to recognize the extent and seriousness of the problem involved and the extent to which health workers could contribute to its prevention and treatment."

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcoholism*, Public Health Service Pub. No. 730, at 9 (rev. 1963):

> "Until recently, alcoholics were generally considered perverse, weak willed, and deserving of punishment rather than help. Only within the past two decades has alcoholism come to be accepted as a medical problem."

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcohol and Alcoholism*, Public Health Service Pub. No. 1640, at 6-7 (1967):

> "In 1956, in an unprecedented action by a major group in organized medicine, the American Medical Association decided by a formal vote of its House of Delegates that 'alcoholism must be regarded as within the purview of medical practice.' This move, later supported by other medical and hospital groups, has been credited with dramatically altering the position of the alcoholic. Because of it, treatment has been sought by many alcoholics who otherwise would have remained hidden, as untreatable victims of an irresponsible craving."

A representative collection of additional authorities which document the recognition of alcoholism as a serious medical illness may be found in Jellinek, *The Disease Concept of Alcoholism* (1960).

APPENDIX B

Summary of the Texas Commission on Alcoholism's *Law Enforcement Handbook on Alcohol Problems*

The Texas Commission on Alcoholism has prepared a *Law Enforcement Handbook on Alcohol Problems* dealing with both the criminal and the civil provisions of the State law relating to intoxication and alcoholism. In a letter endorsing this *Handbook* the Director of the Texas Department of Public Safety notes that:

> "Police officers, by virtue of their oath of office, are obligated to protect the lives and property of the citizenry employing them. This obligation extends to all citizens including the inebriated or alcoholic law violator." P. 4.

In a similar letter the Chief of Police in Austin points out that the police officer who has a "genuinely understanding attitude towards the alcoholic" and who can "direct an alcoholic to a source of information and help" will be of "invaluable help to his community" by "helping to preserve life, health and happiness – as well as law and order." P. 5.

This official *Handbook* of the State of Texas recognizes that alcoholism is an illness:

> "*Alcoholism is an illness.* There is a progression of recognizable symptoms which lead the individual alcoholic from the relatively simple first phase of alcoholism to the complex chronic phase. Alcoholism results in the victim drinking repeatedly to drunkenness – despite the fact that it injures him physically and mentally, endangers his earning capacity, and affects his social and family life.
>
> "It can develop quickly within a few months or slowly through continuous excessive drinking over a period of many years. Mistakenly, the alcoholic is generally considered to be a weak-willed person because he cannot stop drinking. But he is a sick

person, suffering from an overwhelming *compulsion* to drink alcohol, and once started he is *unable* to stop.

"In time he develops a *chronic addiction* to alcohol.

"The cause of the disease is not yet known, but it seems to be a combination of many physical and mental factors. It develops when a person finds that alcohol relieves tension, and continues until the drinker finds he cannot cope with life without the aid of alcohol.

"The most obvious type of alcoholic is the drunken vagrant – the most *obvious* but *not* the most *common*." P. 13.

The *Handbook* describes the stages of alcoholism and suggests clues for the detection of alcoholics. It states that specialized medical treatment for alcoholism is available in six State hospitals in Texas, one of which is the Austin State Hospital.

The *Handbook* recommends that police officers arrest a drunk only if he seems "potentially dangerous." P. 23. It offers the following advice for helping the alcoholic:

"Alcoholics are sick people. They need help – and as a police officer you will often be in the best position to give that help. Your primary concern should be to direct the alcoholic to the local *Council on Alcoholism* if there is one in your community, or to direct him to specialized medical treatment, or other treatment and rehabilitation resources in your community.

* * *

"Until now the alcoholic has been ashamed because he cannot control his drinking. The goal now is to make him ashamed if he fails to *seek help*. If you can help him believe he has an illness, the chances are much brighter that he will seek treatment for it. Thousands of cases have proved this." Pp. 25, 26.

In its summary the *Handbook* points out that "to carry out the functions of his office" the police officer "should make every effort to distinguish between the chronic alcoholic and the person who occasionally has too much to drink." P. 27.

APPENDIX C

Summary of the Record Evidence
Driver v. Hinnant
356 F.2d 761 (4th Cir. 1966)[1]

On December 9, 1963, Joe B. Driver was released from jail after serving a sentence for public intoxication.[2] The next day he was again arrested for public intoxication and was convicted in the Durham Recorder's Court. He noted an appeal to the Durham County Superior Court and was released on December 10. Before his appeal could be heard he was arrested three more times for public intoxication, on December 11, 18, and 19. Each of these arrests likewise resulted in convictions, from which he appealed, and sentences of 90 days for each conviction. (S. Tr. 2, 4, 6.)[3]

On January 27 and 28, 1964, a trial *de novo* was held before the Durham County Superior Court on Driver's appeals of his convictions for intoxication on December 18

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[1] This summary is excerpted from the Brief submitted by American Civil Liberties Union, National Capital Area Civil Liberties Union, and Washington D.C. Area Council on Alcoholism as Amici Curiae to the United States Court of Appeals for the Fourth Circuit in this case.

[2] Most of Driver's arrests occurred in Durham, North Carolina. Section 14-335(12) of the North Carolina General Statutes prohibits public intoxication in Durham County, and authorizes the imposition of graduated sentences for successive convictions for public intoxication within the preceding twelve months: $50 or 30 days for the first offense, $100 or 60 days for the second, and up to two years for the third, the maximum sentence for a misdemeanor under North Carolina law. Public intoxication, without any form of disorderly conduct, is sufficient to violate this provision. A separate provision, Section 14-334 of the North Carolina General Statutes, makes it unlawful for "any person to be drunk and disorderly in any public place."

[3] "S. Tr." refers to the Transcript of the State trial held before the Durham County Superior Court on January 27 and 28, 1964.

and 19. (S. Tr. 6.) Driver admitted that he had been drunk at the times and places alleged but testified that he is a chronic alcoholic who should be permitted to seek treatment rather than be sentenced to jail. (S. Tr. 2-6, 10-12.)

The arresting officer agreed that Driver was "probably an alcoholic." Driver testified that he considered himself an alcoholic. The County Court commented from the bench that "I agree with you thoroughly that you are an alcoholic if ever I saw one." (S. Tr. 8, 10, 13.) Driver testified that he had spent about two-thirds of the previous 35 years in jail for public intoxication. (S. Tr. 10.) His Durham County arrest record showed 203 arrests for public intoxication and other minor offenses related to his drinking. (S. Tr. 12.) Driver testified:

> "That was while I was drinking. I have never been in jail in my life but what it won't the cause of it." (S. Tr. 12.)
>
> * * *
>
> "But I was a'drinking in every one of them – sole purpose." (S. Tr. 13.)

The State offered no evidence that Driver was not a chronic alcoholic.

The trial court nevertheless found Driver guilty as charged and sentenced him "to be imprisoned in the common jail of Durham County for a period of two years to be assigned to do labor as provided by law" on each of the two charges, the sentences to run concurrently. (S. Tr. 14.)

Driver appealed this decision to the North Carolina Supreme Court, which affirmed both his convictions and the sentences. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

On November 30, 1964, Driver's counsel filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, claiming solely that his convictions contravened the Eighth and Fourteenth amendments to the United States Constitution.

A hearing was held on February 5, 1965 before Chief Judge Butler to determine whether Driver was a chronic alcoholic.

Before the District Court an affidavit of Thomas T. Jones, M.D., was introduced into evidence. Dr. Jones affirmed that "It is my opinion Mr. Driver is alcoholic, and has suffered from chronic alcoholism for many years." He stated that Driver had been a patient, and characterized his illness as "chronic, compulsive, repeated, excessive use of alcoholic beverages." When Driver was asked whether he had "ever had any success in staying away from the bottle," he replied "No." (F. Tr. 19.)[4]

Driver's 17-page FBI arrest record, which contains the following yearly entries, indicates the severity of his disease:

1935	2	1945	7	1955	19
1936	5	1946	3	1956	14
1937	3	1947	1	1957	10
1938	6	1948	3	1958	7
1939	1	1949	0	1959	5
1940	5	1950	2	1960	5
1941	10	1951	12	1961	6
1942	12	1952	20	1962	0
1943	2	1953	11	1963	8
1944	15	1954	10	1964	6
				Total:	210

(The FBI record may understate the magnitude of Driver's problem, for his Durham County record shows some 203 arrests while the FBI records only 149 arrest entries for Durham County.) Driver again testified that "all" of the time spent in jail was attributable to his use of alcohol. (F. Tr. 19.) The State's Attorney was given an opportunity to submit interrogatories to Dr. Jones or to present counteraffidavits but again declined to present any evidence to show that Driver was not a chronic alcoholic.

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[4] "F. Tr." refers to the Transcript of the hearing held before Chief Judge Butler on February 5, 1965.

Driver's need for treatment was substantiated by virtually every piece of evidence in the record. Dr. Jones' affidavit stated that Driver:

> "is a sick man in need of treatment; he is in need of rehabilitation efforts consistent with his limited potential and performance reserves; and/or domiciliary care with supervision, guardianship and protection, rather than punishment."

A letter to Judge Butler from the Director of the North Carolina Prison Department, underscored this need:

> "I agree completely with Dr. Thomas F. Jones that this man needs treatment rather than punishment. For the most part men such as Driver are guilty of nothing other than being drunk in public. . . succumbing publicly to the disease of alcoholism . . . . I feel this [treatment] would help tremendously in breaking the cycle of revolving-door drunks who continue to return to prison."

The Director quite candidly admitted that the North Carolina Jails offered no genuine treatment for Driver's chronic alcoholism.

The result of this lack of treatment facilities was apparent in Driver's testimony and arrest record. He testified that he needed help but had never received any, and that his illness had progressed to the stage where he was incapable of overcoming it by himself:

> "I want to do something about it but it don't look like I can." (S. Tr. 10.)
>
> * * *
>
> "No, I have got a bad record for drinking. I know that, and it don't look like – I haven't been able to do anything for it. . . . I would like to get some help." (S. Tr. 11.)

Judge Butler found that Driver was a "chronic alcoholic" in that he "chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control

with respect to the use of such beverages," and he took judicial notice of the fact that a chronic alcoholic "is a sick person in need of proper medical, institutional, and rehabilitative treatment." *Driver v. Hinnant*, 243 F. Supp. 95, 97 n. 6 (E.D.N.C. 1965). But he denied the petition, holding as a matter of law that it is not cruel or unusual punishment to imprison a chronic alcoholic for being intoxicated in public.

APPENDIX D

Summary of the Record Evidence
Easter v. District of Columbia
361 F.2d 50, (D.C. Cir. 1966)
(*en banc*)[1]

DeWitt Easter was arrested on September 23, 1964 and charged with the crime of being intoxicated in public, a violation of section 25-128 of the D.C. Code. The following day he appeared in the District of Columbia Court of General Sessions, Criminal Division, and pleaded not guilty. Trial began immediately.

As its first and only witness the Government called the police officer who had arrested Easter. He testified simply that Easter was intoxicated when arrested. (Tr. 3-4.) The Government then rested its case. This testimony was not contradicted, and Easter did not deny that he was intoxicated in public as charged.

When trial resumed on September 29, uncontradicted evidence was presented that Easter suffered from the sickness of chronic alcoholism and that this sickness was the cause of his public intoxication. He contended that his sickness afforded a complete defense to the charge of public intoxication.

During the trial and at its conclusion the trial court's attention was drawn to section 24-501 *et seq.* of the D.C. Code, 61 Stat. 744 (1947). These provisions permit a judge to institute civil proceedings to commit a "chronic alcoholic" to the D.C. Alcoholic Rehabilitation Clinic for treatment and rehabilitation, once the District Commissioners have certified to the Court of General Sessions that "proper and adequate treatment facilities and personnel have been provided." The trial court ruled that it would exercise its discretion not to institute civil commitment proceedings and observed that,

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[1] This summary is excerpted from the Brief for Appellant in the United States Court of Appeals for the District of Columbia Circuit.

in any event, the requisite certification had not been shown to exist.[2]

As might be expected from Easter's lack of education, history of constant drinking to excess, and present debilitated condition, the record contains minor factual discrepancies and inconsistencies. But the story of his gradual deterioration from a useful working citizen to a homeless skid row derelict constantly arrested for public intoxication because of his chronic alcoholism remains crystal clear.

Easter, 60 years old and a plasterer by trade, left school after the eighth grade to learn his trade from his father. Until 1960 he was able to hold steady employment, earning as much as $175 per week. (Tr. 10-11, 19, 42, 95; D. Ex. 7.) He apparently began drinking in about 1925, and at first drank only sporadically. By the 1930's he was consuming alcoholic beverages on a regular basis, gradually increasing his intake in an attempt to cope with family responsibilities and work stress. He was first arrested for public intoxication in 1937. (Tr. 11-13, 16, 41-42, 91; D. Ex. 1, 7.)

At that time Easter was still able to control his drinking "to a certain extent":

> "As I started drinking on a weekend I would probably last for maybe a couple of more days, and if I drank one day and some part of one night during the week I went to work the next day, but if I drank two days in succession I had to take a couple of more days to get straightened out." (Tr. 12)

But Easter progressively lost control over his use of alcoholic beverages and experienced a corresponding deterioration in

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[2] On February 14, 1950, the President of the District of Columbia Board of Commissioners certified to the Chief Judge of the Municipal Court that an outpatient Alcoholic Rehabilitation Clinic had been established, but stated that there are "no facilities for the confinement and hospitalization of chronic alcoholics committed to it by the Municipal Court for treatment."

virtually every aspect of his life. (Tr. 41-42, 91, 94; D. Ex. 7.) By 1960 he was unable to hold down a job. He now depends solely upon disability payments for support. (Tr. 19, 42, 95; D. Ex. 7.) His relationship with his wife and two children deteriorated, culminating in a separation from his wife in 1957 and a divorce in 1959. Relatives would not associate with him while he was intoxicated. (Tr. 42, 94; D. Ex. 7.)

Easter's arrests became progressively more frequent. In 1963 he was arrested 12 times for intoxication. His police record shows approximately 70 arrests since 1937, all for intoxication or other minor violations directly attributable to his drinking. (Tr. 17-19, 39, 41-42, 94; D. Ex. 1, 7.) At times he has consumed two or three fifths of whisky a day. His "usual" consumption may be two pints or as much as it takes to pass out. On innumerable occasions he has been intoxicated but avoided arrest. (Tr. 25; 36-37, 41-42, 60-61, 91-94, 104-105; D. Ex. 3, 7.)

Easter's physical condition has deteriorated badly as a result of his drinking and consequent lack of proper diet. He suffers from blackouts and impending delirium tremens. On at least two occasions he sought medical help when he had become almost too weak to walk. He now suffers from several physical infirmities commonly associated with chronic alcoholism. (Tr. 19, 27, 43, 50-51, 94-96; D. Ex. 3, 7.)

His family life destroyed, Easter has no regular place to live and therefore stays wherever he can. His police arrest record shows 23 different addresses in the past eight years, and on three occasions he apparently could not furnish even a temporary address. (Tr. 10, 38, 42, 94; D. Ex. 1, 7.)

With help, Easter has occasionally refrained from drinking for short periods. Periodic hospitalization appears to have "slacked me up for a while," but he always returned to drinking within a short time. Indeed, in June 1962 he turned to the Alcoholic Rehabilitation Clinic for help because "he thought he could stop drinking on his own" but

found he could not. He once participated in the Alcoholics Anonymous program sponsored by the Court of General Sessions, but after several months left the program and has not used it again. (Tr. 19-20, 24-26, 31, 36; D. Ex. 7.)

All of the doctors and public health nurses who have examined or interviewed Easter during the past ten years have concluded that he is a chronic alcoholic. The record contains no evidence that can properly be interpreted as refuting this diagnosis. (Tr. 45, 56-57, 102; D. Ex. 3-7.)

Two Washington physicians who specialize in the treatment of chronic alcoholics, Dr. Earl H. Mitchell and Dr. Anthony Zappala, independently conducted a physical examination of Easter, questioned him about his past history, and reviewed pertinent medical and other records. Dr. Mitchell, an internist, testified that Easter is suffering from malnutrition, anemia, peripheral neuritis, and enlargement of the liver, all of these conditions consistent with his past history of excessive use of alcohol. Indeed, Dr. Mitchell stated that peripheral neuritis is uncommon except in cases of chronic alcoholism. From Easter's history and his present physical condition, Dr. Mitchell concluded that he has lost self control over the use of alcohol and is a chronic alcoholic. In cross-examination, he testified that he had no reservations whatever about this opinion and diagnosis. (Tr. 41-43, 45-46, 49-51, 56-57, 63-64, 68.)

Dr. Zappala, a psychiatrist, testified that by the early 1940's Easter had "lost control over his ability to handle alcohol, and at that point one can say that alcoholism set in." He described the typical pattern of physical, social, and psychological deterioration that accompanies chronic alcoholism, and testified that Easter's history and condition are characteristic. He stated that fractures, infections, and head injuries are the most common physical complications of chronic alcoholism and pointed out that Easter suffers from all three. (Tr. 91-96, 98-100, 103-105.)

On occasion Easter has gone to D.C. General Hospital in a state of acute intoxication "because I was in bad shape and

needed hospitalization," to get help for his "alcoholic condition." (Tr. 25-26, 31-32, 36.) His hospital records confirm the seriousness of his chronic alcoholism. For example:

a. Easter was admitted on August 18, 1957, and discharged two days later with a final diagnosis by the attending physician of "alcoholism." The admitting physician's notes state that Easter was a "chronic alcoholic starting D.T.'s yesterday." The physician who conducted the physical examination described him as a "chronic alcoholic. . . after 2 week binge." (D. Ex. 5.)

b. Easter was admitted on January 15, 1958. The physician's diagnosis was "chronic alcoholism and minimal acute alcoholism." (D. Ex. 6.)

c. Easter was admitted on May 7, 1962. The admitting physician noted that the patient "admits to 24 day alcoholic binge and at present is too weak to walk – has no place to go. . . undernourished. . . . dehydrated," and designated the problem as "acute and chronic alcoholism." Although the psychiatric ward concluded that admission was not warranted, the admitting physician decided that Easter "must be admitted. . . as a social emergency." He was accordingly admitted to the medical ward "to assay extent of damage incurred over 30 day period of heavy drinking." The physician who prepared the clinical record stated that Easter was a "chronic alcoholic" who, about 30 days before admission, "began drinking heavily – whisky 2-3 fifths a day." He was described as "poorly developed, poorly nourished, unkempt. . . appearing chronically ill," with "impending DT's and mild malnutrition secondary to chronic alcoholism and poor dietary habits." (D. Ex. 3.)

Easter occasionally voluntarily went to the D.C. Alcoholic Rehabilitation Clinic to get help for his "alcoholic condition." (Tr. 25-26, 30-32, 36.) His records show that he visited the Clinic twelve times, and that he used the Clinic "mainly for emergency medication."

a. Easter first visited the Clinic on October 6, 1953, after "consuming large quantities of whisky within the past

10 days," seeking "something to straighten me out." He was given medication and advised to "rest at home." (D. Ex. 7.)

b. He next visited the Clinic on March 17, 1961, for "emergency services," and again received medication. The Clinic record describes him as "chronically ill and debilitated." It further states:

> "He started drinking in 1927, but very heavy in the 30's with the lifting of prohibition. He was able to work every day for many years. Has not worked now for 1 year.
>
> "Drank 3 pints of wine last week, vomited for 2 or 3 days. He has recent cuts on his face 'I fell, so weak, you know.' "

Easter asked for help and was told to return in four days – an appointment he failed to keep. His problem was described by the Clinic's Chief Psychiatric Social Worker as "alcoholism (addiction)." (D. Ex. 7.)

c. Easter returned again to the Clinic "for help with drinking problem" on June 6, 1962, and was given medication. The report states that he was then "drinking nearly 1/5 whisky daily – plus beer," and "has been on binge for over 2 months daily." His condition was again described as "alcoholism (addiction)." (D. Ex. 7.)

Dr. Zappala described chronic alcoholism as an "illness" that is "symptomatic of underlying and very complex other factors," including "physical, psychological, sociological" factors but not limited to any one. He explained that a chronic alcoholic usually first begins to drink socially and then increases his consumption to help cope with the responsibilities and stresses of life, finally losing control. Dr. Zappala used "loss of self-control" to mean the same as "no longer able to moderate or stop" or "unable to make the decision" or "behavior is out of hand." (Tr. 91, 101.) Dr. Mitchell described chronic alcoholism as a "disease," and admitted that it is not known definitely whether it is a physical or mental condition. He considers "alcoholism"

to be synonymous with "alcoholic addiction," and "loss of self-control" to be synonymous with "loss of the will." (Tr. 46, 70-71.)

Dr. Mitchell also testified that the prevailing medical view is that a chronic alcoholic can never again safely resume social or temperate drinking, and that his only recourse is to stop drinking completely. Hence, abstention and complete sobriety is the objective of medical treatment. Complete sobriety will mean, of course, that the individual is no longer habitually intoxicated, because he is no longer drinking, but the inability to stop drinking will remain latent in him and will in all but a few rare cases cause an immediate return to the typical pattern of the chronic alcoholic if drinking is resumed. (Tr. 67, 69-72.) Dr. Zappala added that a lack of self control over the use of alcohol is rooted in, and intrinsic to, the personality of the chronic alcoholic. Although chronic alcoholism cannot be cured, he testified, it can, "with adequate treatment," be "favorably influenced" to the extent of allowing the patient to lead a normal life without drinking. (Tr. 91-92, 101.)

At the conclusion of the trial, counsel requested special findings of fact that Easter is a "chronic alcoholic" as defined in section 24-502 of the D.C. Code and that, as a chronic alcoholic, he is a sick person suffering from a disease. (Tr. 115-116). The trial judge ruled that both points were irrelevant and refused to make the requested findings of fact. (Tr. 122-123.)

The trial court also rejected Easter's legal arguments that, as a chronic alcoholic, he lacked the criminal capacity necessary to violate section 25-128, and that to convict him for publicly exhibiting the symptoms of his sickness would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (Tr. 118, 123.) Easter was thereupon found guilty as charged and sentenced to 90 days imprisonment, although execution of the sentence was suspended. (Tr. 121, 123.)

In the District of Columbia Court of Appeals Easter relied upon the same factual and legal arguments as he had raised in the trial court. On April 29, 1965, that court affirmed the trial court's judgment. *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

APPENDIX E

Summary of the Record Evidence
Seattle v. Hill
Washington Supreme Court No. 39050
Argued March 28, 1967.[1]

At the time of his arrest on May 4, 1966, Wayne J. Hill was lying unconscious on a Seattle sidewalk. (St. 6.) Although unable to make his way home by himself, he was not disorderly or in any way threatening any person or property. (St. 8.) He presented no danger to anyone. Hill was charged with being "willfully and unlawfully drunk in a public place" in violation of Seattle Municipal Ordinance No. 16046, which provides in pertinent part:

> "It shall be unlawful for any person to be guilty of. . . drunkennesss. . . ."

The trial court construed this ordinance as prohibiting only drunkenness in public. (St. 91.) Hill did not dispute that he was drunk and in a public place when arrested.

At his trial *de novo* Hill admitted that he was a "chronic drunk" and lamented that he is not living "like a human being." (St. 13.) His uncontrolled drinking began about 1946, when his wife divorced him and his family life disintegrated. (St. 13-14.) His personal life and his physical condition have been deteriorating ever since. He has not worked regularly for many years. (St. 16, 37.) He was treated for tuberculosis in 1952, has lost more than 50 pounds, and now experiences "blackouts." (St. 13, 15-16, 22.)

Since 1949 Hill has been arrested 99 times for being drunk in public in the City of Seattle alone. (Ex. 1, St. 9.)

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[1] This summary is excerpted from the Brief submitted by North American Association of Alcoholism Programs, Washington D.C. Area Council on Alcoholism, and National Council on Alcoholism as Amici Curiae to the Washington Supreme Court in this case.

He has been sentenced to more than 17½ years in jail for this offense and was under suspended sentences totalling more than 5 years. He had never been arrested for an offense not related to his drinking. (Ex. 1, St. 9.)

Hill has at times interrupted his drinking, once for 18 months when he was in a Public Health Service hospital. (St. 15, 17, 18.) But he no longer is able to keep from drinking, except when deprived of alcohol while in jail. He admitted that he cannot help violating the law. (St. 24.) Hill testified that he still wants to overcome his disease and promised he would put forth a "good effort" if the opportunity to do so were provided. (St. 20.)

Dr. Edward M. Pattison, Professor of Psychiatry at the University of Washington, who examined Hill and had access to his medical records, testified that Hill is a classic example of a victim of chronic addictive alcoholism. (St. 37-38, 58.)

> "Mr. Hill presents the typical symptoms and manifestations of the disease of alcoholism as has been defined by the World Health Organization, the American Medical Association, the National Council of Alcoholism and the American Psychiatric Association among other bodies. It is also a formal diagnosis in the classification scheme of the American Medical Association and in the diagnostic classification scheme of the American Psychiatric Association." (St. 60-61.)

His physical deterioration, the breakdown of his family and social relationships, and his inability to retain employment, according to Dr. Pattison, are typical of chronic addictive alcoholics. (St. 61-63.)

Dr. Pattison stated that Hill is no longer able to refrain from drinking or to control his consumption of alcohol once he has begun drinking. (St. 61, 63.) In his opinion, Hill is unable to lead a life different from that he has led for the past 17 years. (St. 38.) His previous sporadic periods of abstinence, Dr. Pattison testified, are characteris-

tic of chronic alcoholics whose lives are periodically interrupted by enforced detention. (St. 38, 63.)

In short, Dr. Pattison found that Hill is addicted to and dependent upon alcohol, that he is no longer able to control his drinking, and that his drinking and his appearances while drunk in public are symptoms of his disease. (St. 61-62, 73.) Dr. Pattison testified further that Hill requires treatment rather than punishment (St. 74.), which has not deterred and will not deter the drinking. (St. 65-66, 69-70.)

Dr. John H. Lindberg, President of the Washington State Society of Internal Medicine, testified that Hill's medical history left no doubt that he is a chronic alcoholic. (St. 84.) He described Hill's inevitable physical decline if his disease is not treated, including cirrhosis of the liver, brain cell deterioration – which has already begun – and nerve destruction. (St. 85-86.) If his disease continues untreated, it will eventually result in his death. (St. 87.) Dr. Lindberg made clear that Hill can be treated. (St. 86.) In his judgment, however, the chances that Hill could ever overcome his disease without assistance are less than 1 in 20. (St. 87.)

The Honorable Charles Z. Smith, Judge of the Municipal Court of the City of Seattle, described the incidence of chronic alcoholism in the Seattle area and the deplorable lack of treatment facilities. (St. 39-54.) He pointed out that in Seattle no public funds are being spent on alternatives to imprisonment of chronic alcoholics. (St. 47, 53.) The few "informal" voluntary agencies are clearly not sufficient to cope with the problem. (St. 49.) No Seattle hospital will admit patients that are diagnosed primarily as alcoholics. (St. 50.) At the same time, Judge Smith testified, Seattle spends $3,497,579 annually to arrest, prosecute, convict, and jail chronic alcoholics who are found drunk in public, easily enough to fund a modern treatment and rehabilitative program. (St. 54.)

The trial court construed Ordinance No. 16046 as prohibiting only drunkenness in public. The court admitted that Hill is a chronic alcoholic. It ruled, however, that alcoholism is not a defense to a criminal charge.

APPENDIX F

Summary of the Record Evidence
People v. Hoy
Michigan Supreme Court No. 51563
Argued November 7, 1967.[1]

When he was arrested on July 31, 1964, Frederick Hoy was standing in an intersection in the City of Lansing. (Tr. 27.) He was attempting to hitchhike home from the Casanova Bar after having tried unsuccessfully to call a taxicab. (Tr. 69.) The record contains no evidence that he was disrupting traffic or annoying passersby, or in any way threatening any other person or property. Hoy was charged with violating section 28.364 of the Michigan Annotated Statutes which provides:

> "[A]ny person who shall be drunk or intoxicated. . . in any public place. . . shall be deemed a disorderly person."

Hoy's plea of guilty was accepted on August 9, and in October he was sentenced to the State Prison at Jackson, Michigan "for not less than one and one-half nor more than two years."

Some time after, Hoy filed with the Circuit Court for Ingham County a petition to vacate his sentence and withdraw his plea of guilty, and for a new trial. A hearing was held on January 22, 1965, at which he presented testimony to establish his defense.

Hoy's first witness was Richard C. Bates, a specialist in internal medicine and Managing Director of the Alcoholism Therapy Unit at the Edward W. Sparrow Hospital. Dr. Bates had examined Hoy, and studied his medical records and ar-

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[1] This summary is excerpted from the Brief submitted by North American Association of Alcoholism Programs, Washington D.C. Area Council on Alcoholism, National Council on Alcoholism, American Civil Liberties Union, and American Civil Liberties Union of Michigan as Amici Curiae to the Michigan Supreme Court in this case.

rest record. (Tr. 4.) He testified that Hoy had begun drinking at the age of 12 and had first experienced blackouts as a result of his drinking at the age of 16. (Tr. 5.) According to Dr. Bates, Hoy has blacked out from drinking on at least 100 occasions and has been arrested more than 20 times because of his drinking. (Tr. 6.) Dr. Bates reported that Hoy's wife had divorced him, taking their only child, because of his inability to stop drinking. (Tr. 6-7.) During only 6 months of the last several years of his life has he been able to refrain from drinking, *viz.*, during two three-month periods in 1950 and 1961. (Tr. 7.)

Dr. Bates testified that, in his opinion, Hoy is a chronic alcoholic. (Tr. 9.) He defined chronic alcoholism as a disease that impairs its victim's ability to function in society, and stated that almost all alcoholics are unable to control their drinking. (Tr. 9-11.) He described Hoy as a severe victim of the disease, who cannot stop drinking without treatment. (Tr. 11.) In Dr. Bates' judgment, repeated conviction and imprisonment are of little help in effecting treatment. (Tr. 17-18.)

Hoy's second principal witness was Dr. Donald Damstra, a physician at Brighton Hospital, which is devoted entirely to the treatment of chronic alcoholics. Dr. Damstra has had wide experience in dealing with chronic alcoholics. (Tr. 31-32.) He agreed with Dr. Bates' testimony that Hoy is unquestionably a chronic alcoholic, that he has been a chronic alcoholic since the age of 16, and that he was suffering from chronic alcoholism on July 31, 1964. (Tr. 33-34.) He stated that alcoholics characteristically have no control over their drinking and that their intoxication is generally symptomatic of their disease. (Tr. 34.)

Dr. Damstra also agreed that imprisonment is not a recognized treatment for chronic alcoholics. (Tr. 35.) He was pessimistic but not without hope that Defendant would respond to treatment under the proper circumstances. (Tr. 44-45.)

Hoy's own testimony confirmed the accounts of Dr. Bates and Dr. Damstra. He acknowledged that he had begun drinking at the age of 11 or 12, that he had been able to refrain from drinking only for two short periods and that he had always gone back to drinking. (Tr. 47-48.) Hoy testified that he had lost several jobs as a result of his drinking and that he had not worked regularly for 3 years. (Tr. 48.) He is unable to stop drinking because he experiences the "shakes" and admitted that drinking has become the center of his life. (Tr. 50, 65-66.) Hoy also testified that he would be willing to undergo treatment no matter how long it required. (Tr. 50, 55.) Hoy conceded that he had been intoxicated when he was arrested on the evening of July 31, 1964, and that he had called a cab in order to avoid arrest. (Tr. 46, 60, 70.) He testified that he had been arrested 24 times for drunkenness. (Tr. 67.) So far as the record reveals, Hoy has never been arrested for an offense not related to his drinking.

Appellee presented no evidence at the hearing. The evidence presented by Defendant and by Dr. Bates and Dr. Damstra therefore stands uncontradicted.

On February 16, 1965 the Circuit Court denied Hoy's petition to vacate his sentence and plea and for a new trial. On July 12, 1966 the Court of Appeals affirmed the action of the Circuit Court.

APPENDIX G

Representative Community Comments on Criminal Punishment of Chronic Alcoholics for Public Intoxication

Stern, *The National Crime Commission's Report on Public Drunkenness: Where Do We Go From Here?*, North American Association of Alcoholism Programs Spec. Rep. No. 40, at 2-4, 6 (September 28, 1967). Mr. Stern was the staff member of the President's Commission on Law Enforcement and Administration of Justice who had direct responsibility for researching, preparing, and documenting the Chapter of the Commission's Report devoted to "Drunkenness Offenses."

> "The Commission recommended that drunkenness not be a criminal offense. This recommendation endorsed, by implication, the recent court decisions barring the prosecution of alcoholics on charges of drunkenness. It is noteworthy that none of more than four hundred other Commission recommendations sought to repeal any existing law.
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> * * *
>
> "Even the most casual observation of people arrested for drunkenness reveals that most are extremely poor. Many live on skid row and are beset by a variety of complex medical and social problems. Many experience repeated cycles of arrest, brief incarcerations and release to skid row. Many so-called chronic offenders – in reality, chronic alcoholics – have histories of one hundred to two hundred arrests and have served up to twenty years or more in jail on short term sentences for nothing more than being intoxicated.
>
> "After arrest, these hapless defendants are booked, placed in a barren cell – called a 'tank' – and subsequently sentenced to jail or released. Between the point of arrest and sentencing they are paraded before a magistrate, who too often uses the opportunity to entertain the courtroom audience. In court they are given few of the due process safeguards to

which the law says they are entitled. This is one paradox of the system. It is convenient to resort to the criminal system to handle poor alcoholics but too inconvenient to provide the protection which should accrue in every criminal case.

"During their stay in jail, from the point of arrest to release, they receive the most rudimentary assistance. It should be no indictment of the police and correctional authorities that proper services are not provided. The business of the criminal system is not to provide the services necessary to meet complex medical, welfare and social needs. The paddy wagons are not ambulances. The tank is not a clinic. The jailhouse guard is not a doctor, nurse or social worker.

"Moreover, the arrest process, per se, implies certain formalities designed for the handling of persons accused of committing crimes. A Commission study concluded, for example, that some of the 'police brutality' observed took place while the police were attempting to book drunkenness offenders. The fact that inebriates are in no condition to stand against a counter and answer questions is foreign to the entire criminal process.

"Further, the police are simply not sufficiently trained to cope with the needs of this population. And, regardless of their training, Commission studies revealed that many are not well-suited for the type of services they provide. The high incidence of physical abuse recorded by Commission observers involving public drunkenness defendants becomes more understandable when viewed in the light of a detailed study undertaken with Commission funds of police 'patterns of behavior.' Policemen treat inebriates with a greater degree of belligerence and prejudice than they treat non-inebriates. It was concluded that police attitudes manifest themselves in police behavior because of the great autonomous discretion the police have in dealing with inebriates.

"Proper treatment for the effects of intoxication as well as comprehensive treatment for alcoholism are unavailable between arrest and release. Nor is any attempt made to provide the social and vocational counseling so desperately needed. The offender is merely released from jail or court and expected back within a few hours or days. With the fortification of a few days of sobriety, in fact, he is more able and more willing than ever to continue his drinking pattern.

"In the clearest of terms, the Commission stressed that the use of the criminal system to arrest non-disorderly inebriates – whether or not alcoholic – is wrong. The need to remove unseemly sights from public view – the traditional 'street cleaning' function of such arrests – was not appreciated. (And I would add that as long as such unseemly sights exist, they should always remain in public view.) Nor was the Commission pleased with the distortion of the criminal process, including discriminatory arrests and the failure to provide guaranteed rights in the police station and in the courtroom.

* * *

"In seeking the repeal of drunkenness laws, the Commission has not disputed the logic or necessity of offering emergency welfare services. The judge in drunk court who, upon sentencing the chronic offender, says: 'Sixty days, you'll freeze to death out there,' seems truly motivated by the defendant's best interests. But the need for food, shelter and medical care does not justify the continuance of the criminal system. More and better welfare services are needed. More and better medical services are needed. More and better counseling is needed, and more and better alcoholism treatment programs are needed. There is little doubt that the accessibility of the jails – virtually used to hide this problem – is largely responsible for the lack of necessary services and treatment programs. As urged by the two recent Presidential

Crime Commissions, we must abandon the view that arrest is the only alternative and focus our attention on the basic problems and the best ways of meeting these problems.

* * *

"The Court's ruling in *Easter v. District of Columbia* will eventually be the law of the land. It is far too reasonable and just to be otherwise.

* * *

"In the absence of an expanded effort by interested groups and individuals, however, the Report of the Commission will have little impact upon existing procedures. It hardly needs mentioning that the report will not drive fifty state legislative bodies into emergency session to repeal public drunkenness laws. Nor will it singlehandedly change existing arrest policies in the more than 4,000 cities across the country. To obtain optimum results it must be employed as persuasive authority and its findings and suggestions urged upon those able to effect change. It must be supplemented by legal challenges of existing abuses.

* * *

"The paucity of court decisions in this area reflects merely the lack of challenges in court, seemingly caused by a general indifference to the skid row resident. It is only the absence of such legal challenges in Chicago, for example, that permits the daily arrests of non-disorderly homeless men on charges of disorderly conduct.

* * *

"Finally, we can all assist in bringing about the inevitable change by insisting that so long as the present system exists, all criminal justice personnel – including the police and judiciary – treat all citizens alike. Since this system is unable to perform without discrimination and abuse we can thus ensure its early demise.

> "Now let me emphasize this point: it may be debatable whether drunkenness is so anti-social, so immoral and so contrary to our ethics that it should be punishable by criminal laws. But it is not debatable that the system, if it continues, must act in a non-discriminatory manner and must safeguard the guaranteed rights of all offenders. Accordingly, we must insist that every person drunk in public should be arrested or none at all. We must insist that every person or none at all be given the right to a trial, the privilege against self-incrimination, the right to present evidence and to cross-examine the arresting officer. We can not have it both ways. If we use the criminal system, we must provide the protections which are so sacred in criminal cases."

Goldfarb, *Roadblocks to Progress in the Treatment of the Chronic Inebriate,* North American Association of Alcoholism Programs Spec. Rep. No. 39, at 2, 4-5 (September 28, 1967). Mr. Goldfarb was the staff member of the President's Commission on Crime in the District of Columbia who had direct responsibility for researching, preparing and documenting the Section of the Commission's Report devoted to "The Drunkenness Offender."

> "Every city has a particular set of laws which determine the procedures to be followed in handling a person who is found to be intoxicated in public. These laws authorize and direct certain people to deal with the public inebriate in certain ways. They are the framework within which the chronic inebriate lives – a framework of cynicism and inhumanity. In order to change the way society deals with the chronic inebriate, it is essential to change the applicable legal framework. A statutory structure devised for punishment is not suitable where treatment is the goal.
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> "As we began our study in Washington, we were awaiting the *Easter* decision. Although the result was widely anticipated, the government made no preparations for it and made every effort to ignore

it. The public prosecutor took the position that the *Easter* defense had to be raised by the public intoxication defendant – an approach which would have aborted *Easter's* impact. Public health authorities, beset by budgetary problems, failed to press for the implementation of *Easter*. The Commission tried to encourage reforms in the city's system of handling drunkenness offenders. On all sides, we found public officials decidedly uninterested in spearheading or even cooperating in reform.

"The situation we found in Washington is common. Public officials tend to be conservative. They resist change in orderly procedures they have come to rely upon. The risks of change are greater than its rewards. If we in Washington, with the imprimatur of the President behind us had the difficulty that we did, I can imagine the warmth with which local bureaucracies greet reformist ideas.

"The derelict alcoholic has never been the subject of serious public concern in the United States. Drunkenness has been considered a moral flaw worthy of condemnation. That aura continues to surround the alcoholic, in his own and the public's mind. Absent a sudden upsurge of will power, a drunk is destined to remain a drunk.

"The derelict alcoholic has no constituency. There is no one to press for reform in his treatment. His family is sufficiently detached from him and disgusted with him that they simply do not care.

"In sum, there has never been any significant public pressure for reform in the treatment of alcoholics. But without such pressure, reform efforts cannot help but fail.

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"In my opinion, any substantial progress toward reform, in the present climate of public opinion, is decidedly unlikely. There is only one way to achieve reform. That is to utilize every available technique

to arouse public opinion and thereby place pressure on government agencies.

"The most obvious pressure technique is litigation. The issues involved in the *Easter* case, the lawfulness of civil commitment and the right to treatment can be the basis of litigation in every community. By litigation, I do not mean simply the establishment of a particular legal rule. I mean continually making certain that the particular legal rule is being properly applied. For example, a specific jurisdiction may have accepted the rule that a chronic alcoholic cannot be convicted of the criminal offense of public drunkenness. Such a ruling is not an end in itself, but a means of assuring proper treatment of the alcoholic. All too often, for what they view as eminently practical reasons, local prosecutors, courts, correctional personnel and other governmental officials are likely to thwart the thrust of the new rule. Prosecutors may continue as before. Appropriate pre-trial diagnosis may not be available. Workhouses may change their label without changing the substance of their activities. In order to assure that the alcoholic's rights are being continuously protected and expanded, every community should have an attorney who takes that responsibility. The particular status of this lawyer will depend on the size of his city and other pertinent factors. The important thing is that there be a competent attorney who devotes a part of his time to representing the interests of the derelict alcoholic community in this time of legal change."

"Opportunity For Urban Excellence," *Report of the Atlanta Commission on Crime and Juvenile Delinquency* 122-123 (February 1966).

"Focusing on alcoholism and the crime of public intoxication in Atlanta, we learn from the latest annual report of the Atlanta Police Department that over half of the arrests made for non-traffic offenses in 1965 involved public intoxication.

"According to a study by the Emory University Department of Psychiatry on the alcoholic prisoner in Atlanta, done in 1963, arrests of the alcoholic utilized 40% of the municipal court time, utilized 60% of police time, the alcoholic occupied 60% of the space in the city jail and composed 95% of the stockade inmates. To this must be added the additional financial loss to the Atlanta business community stemming from absenteeism.

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"The alcoholic remains one of the forgotten men in our community, with no governmental body, local, state, or federal taking adequate responsibility for his care and rehabilitation.

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"It has become clear that neither fines nor imprisonment rehabilitates these men."

Ramon, *Radio Interview* (January 17, 1967). Mr. Frank Ramon, Chief of Police of the City of Seattle, Washington, made these comments during a documentary entitled "Cycle of Shame."

ANNOUNCER: "Do you feel that alcoholics should be jailed or should they not be jailed but treated as sick people?"

CHIEF RAMON: "Well, as a public official I have no choice. Whether alcoholism is a disease or not would not affect my official position. Drunkenness is a crime. So we must enforce the law by arresting these people. We know in the Police Department that probably right at this moment there are more than 200 men in the city jail serving sentences for drunkenness who have never posed any threat to the community in any fashion at all. The only person they've hurt is themselves. We also know that if these people were not arrested and jailed at frequent intervals they wouldn't live very long. We do know that there must be a better way to handle them and we do know that these

people are not criminals in the sense of having selected a different than normal way of living. * * *

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"The police are concerned with the protection of the community. Every police agency in the United States, every municipal one, diverts and wastes too much police time on handling persons who don't pose any threat to the community. Certainly I'd like to see a determination that these people who are living useless futile lives, and certainly it's not because they want to, that they are not treated like criminals. I believe that, some 200 years ago mentally ill persons were treated in the same fashion, and I think it is time our society grows up and recognizes that there are problems beyond an individual's control, that though his behavior may be antisocial he should not be treated as a common criminal."

"Alcholism," *Hearings Before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143 (1967). Col. Edward Dowd, President of the Board of Police Commissioners, St. Louis, Missouri, at 17, 18.

"The process of sending persons through City Court, down to the workhouse for 30 or 60 days, or assessing a fine that was never collected, was found to be a dismal failure with a lot of people that were human beings but were treated really more like animals than people.

"We established a Detoxification Center[1] in November of 1966. . . * * *

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[1] St. Louis based its proposal for a detoxification center on the need to meet the requirements of the *Driver* and *Easter* decisions. See "St. Louis Proposal to Establish a Detoxification Center," in U.S. Crime Commission, *Task Force Report on Drunkenness App. C at 50 (1967).*

". . . we are reluctant to believe our own figures, but we are having a drop in arrests for public alcoholism of 66 percent. * * * But the fact remains we are having a lot less of a problem on the street with the public alcoholic than we were having this time last year.

Dr. David Pittman, President of North American Association of Alcoholism Programs and Director of Social Science Institute in St. Louis, Missouri, at 103, 106.

"What happened in St. Louis is that the police and not the health agencies had to take the lead in trying to do something about this particular problem.

"We constantly met with them and the police officer used to take 190 minutes to process one of these individuals because we would have to wait at City Hospital, nobody would see the individual, and so on. We reduced this to 50 minutes of time since the individual can receive treatment immediately.

"The police officer then can get back to his problem on the beat."

Harrington, *The Other America* 95 (Penguin ed. 1963).

"But even more vicious was the Police Pickup. I never understood how the exact number to be arrested was computed, but there must have been some method to this social madness. The paddy wagon would arrive on the Bowery; the police would arrest the first men they came to, at random; and that was that. At night, in the drama of dereliction and indifference called Night Court in New York, the alcoholics would be lined up. Sometimes they were still drunk. The magistrate would tell them of their legal rights; they would usually plead guilty, and they would be sentenced. Some of the older men would have been through this time and time again. It was a social ritual, having no apparent effect on anything. It furnished, I suppose, statistics to prove that the authorities were doing their duty, that they were coping with the problem.

"These alcoholics will probably be left to themselves for a long while. Though their spiritual torment is well known by most Americans, what is not understood is the grim, terrible, physically debilitating life of the alcoholic."

Editorial, *Recent Court Decisions Regarding Imprisonment of Alcoholics,* 197 J. Am. Med. Assn 582 (August 15, 1966).

"Change comes about in strange ways, but at last a change in attitude toward the alcoholic patient is being accomplished.

"For too many years the plight of alcoholic persons, especially those who inhabit skid rows and 'drunk tanks,' has provided the occasion for amusement, disdain, and disapproval. Because of seemingly insurmountable social and administrative barriers, the medical profession has not afforded alcoholics the treatment usually offered to sufferers of more clearly defined medical disorders. The jail, with the policeman, judge, and probation officer acting as unwilling accomplices, was made the dumping ground for this human 'refuse'; here little but futile ritual was exercised, and constructive action was seldom undertaken.

"Recent application of the 8th Amendment of the United States Constitution confronts us with the fact that alcoholism is an illness and must be treated as such. Our society can no longer ignore the fact that it is wrong to punish another human being for being sick, even if the sickness is alcoholism."

Smith, *The Alcoholic and the Law* 20 (May 1966). Judge Charles Z. Smith then sat on the Seattle Municipal Court and now sits on the King County Superior Court.

"Few persons seriously take issue with the conclusions of the courts in the *Driver* and *Easter* cases that the unpretending alcoholic should not be branded a criminal merely because he appears in a public place in an intoxicated condition. Most lawyers and judges will agree that it is cruel and unusual punishment in violation of the Eighth Amendment to the United States

Constitution to jail a person for public intoxication where that intoxication is the result of non-volitional drinking attendant to the disease of alcoholism."

Report of the Minneapolis Task Force on the Homeless Alcoholic 4, 6, 7 (March 1967).

"There are approximately 900 homeless alcoholics in Hennepin County. The vast majority are non-contributing, non-productive members of society. Society's present method of dealing with the problem, almost invariably incarceration, has been singularly ineffective. Almost to a man, the homeless alcoholics in our community continue to be homeless alcoholics.

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"It is conservatively estimated that current 'solutions' to the problem of the homeless alcoholic are wasting the community well over a million dollars a year – including $1 million in police work alone, over $300,000 in Workhouse expenses, municipal court costs – judges, clerks, bailiffs – and General Hospital costs.

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"Manifestly the penal approach fails."

Reid, *Some Medico-Legal Aspects of Alcoholism* 5-6 (November 1967). Mr. Reid, Counsel to the Ontario Addiction Research Foundation, made these remarks in an address to the Conference on the Role of the Medical Practitioner in the Treatment of Alcoholism and Drug Abuse.

"Legal sanctions have not been altogether futile in dealing with problems of alcohol. They can, and do, effectively limit what might be an unbridled consumption on the part of an entire society. But they can do little, or nothing, about the problem of alcoholism.

"Similarly, religious conviction can play an important part in inducing general moderation or even abstinence. But neither has it had much success with

alcohol's most virulent disease – alcoholism. Alcoholism is thus peculiarly a problem for the healing arts.

"This seems so obvious today that the failure to recognize it for centuries seems uncanny or perverse. It is safe to say that all laws, even those still on the books assume that the alcoholic can stop drinking, if he only tries. These laws are thus deterrent and punitive, seeking by penalties to force the alcoholic not to drink. The failure of these laws is a direct result of a failure to understand the nature of alcoholism. Putting a man in jail for 30 days won't cure his arthritis. No more will it cure his alcoholism."

Mahoney, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 34, 35 (June 1962). Judge Mahoney, a Special Justice of the Boston Municipal Court, recalled his first impression of the local "drunk court".

"the literally hundreds of human beings that one saw before the so-called bar of Justice. They were people who certainly were profoundly sick, injured, or pathetic souls, yet who nonetheless were parading methodically along a course which had been prescribed by Legislative statute and by Judicial process, bringing them to a kind of result that was, at best shocking, irresolute, unproductive and wasteful of human energy, human value and resource. So at an early point, it made a very indelible impression upon me regarding the efficacy of law, the importance of law, and the disparity between law and human understanding, knowledge and compassion in our society.

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"Nothing could be more depressing than to see the inexorable application of these laws each day as they exact their toll, this enormous waste of human energy and human resources."

MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 61, 63, 65 (June 1962). Mr. MacCormick was Commissioner of Correction in New York City from 1934 to 1940.

> "Of all the prisoners in this long procession, the alcoholics aroused my humane feelings most deeply and challenged my intelligence most urgently. I saw them come in repeatedly for sentences as short as two days and seldom for sentences longer than thirty days, and go out shaking as badly as when they came in: homeless, helpless and hopeless. I saw them come back again time after time, either in the statistics or as I watched the vans unload at our institutions. Sometimes a dead body would be lifted out of the van, and I knew that the man had been dying when he stood a few hours before in front of a magistrate and, as all too often happened, was given a tongue lashing by the judge.
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> "I am not sure whether I was more impressed by the inhumanity of our methods of dealing with the alcoholic or by the futility of the process. At that time I coined the term 'revolving door jails', which emphasized futility. The shortness of the sentences, which made treatment impossible even if there had been any desire to treat the alcoholics and knowledge of how to do it, and which made return to the same jail or another one almost inevitable, were the result of the practice, still prevalent today, of thinking in terms of the offense rather than the offender. This is expressed in the idea that 'you can't give a man a long sentence just for being drunk,' and that idea leads to the practical reality that you cannot hold an alcoholic long enough to treat him."

In 1956 Mr. MacCormick was Chairman of the Citizens Advisory Committee to the Attorney General of California on Crime Prevention. He quotes from that Committee's Report on "*California Jails*":

"The thousands of alcoholics who spend most of their lives 'wearing out the jails' of their home counties are more than a nuisance to the public, more than a heavy burden on the taxpayer, more than a menace to health. They are symbols of public indifference, of governmental ineptitude.

"Our method of dealing with them – the 'street cleaning operation' by which they are swept out of the doorways and alleys and gutters of our Skid Rows, to be dumped into 'drunk tanks' scarcely less filthy than the gutters, their brief contact with the court, their meaningless run-around through the revolving door jails, their stumbling return to Skid Row, the failure to provide humane, scientific, sustained care and treatment with effective follow-up clinics and social agencies after their release – all this constitutes a violation of basic principles of common sense and common humanity."

Gilbert, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 79 (June 1962). Dr. Gilbert is Deputy Commissioner of the Massachusetts Department of Correction.

"If alcoholism is indeed an illness, then I suggest that we take a long hard look at our jails to see how they measure up as emergency medical facilities. Indeed, if alcoholism is an illness, then I question with Dr. MacCormick the propriety of sending problem drinkers to jail. The history of prisons as dumping grounds for perplexing and bothersome medical and psychiatric puzzles is not yet over it seems."

Goff, *Correction and the Alcoholic*, in *Proceedings of the Department of Health, Education, and Welfare Conference on The Court and the Chronic Inebriate* 21, 22-23 (April 1965). Mr. Goff is General Secretary of the Correctional Association of New York.

"While the topic assigned to me today was 'correction and rehabilitation', as long as we continue to

emphasize the word *police* when we talk of the *police* court offender; as long as we continue to talk about priorities in developing services for the alcoholic *defendant;*' and as long as we consider the Skid Row habitue and the chronic inebriate as in need of a 30 day *sentence*, a six month *sentence*, a year *sentence*, we will continue 'the exercise in futility' of trying to punish away an illness.

"Alcoholism is defined as an illness by the American Medical Association. Yet the use of jails, even the best ones, reflect a two hundred year old punitive attitude.

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"Documentations of the extent of the ineffectiveness of jail commitment of individuals addicted to alcohol is extensive."

Goff, *Alcoholism and the Administration of Justice* 6 (August 1964).

"However, the handling by penal institution commitment of the very symptom that would lead one to suspect alcoholism, namely repeated offenses of public intoxication has not only been ineffective but has created a wide cleavage between the knowledge of the medical and behavior sciences on one hand and the practices in the administration of justice on the other."

Alexander, *Jail Administration* 237 (1957). Dr. Alexander is Director of the Federal Bureau of Prisons.

"The unending series of fines which must be lain out in jail and short jail sentences repeated endlessly month in and month out, year in and year out, bear not the slightest semblance of an intelligent approach to the treatment and solution of the alcoholic's problem."

Pittman, *The Chronic Drunkenness Offender: An Overview*, in *Report of Proceedings of the Department of Health, Education, and Welfare Conference on the Court and the Chronic Inebriate* 6, 13, 14 (April 1965). Dr. Pittman is Professor of Sociology and Director of the Social Science Institute at Washington University (St. Louis).

> "The end stage in America's revolving door policy toward the chronic drunkenness offender is the workhouse or city jail. Previous research studies have shown that repeated incarceration does not act as a deterrent to the chronic inebriate's behavior.
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> "The primary problem is how does one effect change in existing patterns of care for the intoxication offender. Current institutions which handle the problem, such as jails, workhouses, and municipal courts *may* have a vested interest in the maintenance of the *status quo*. It is possible that the community may have more interest in maintaining its vegetable farm or its brood of pigs, the work force for which is the chronic offender, than in a systematic rehabilitation program."
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> "In some communities the emphasis is on the economic contributions of the offenders through their work on local roads and civic projects. There are American municipalities which actually budget the expected services of the offenders to their local civil projects."
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> "The major problem confronting us in dealing with the chronic drunkenness offender, however, is the lack of a focus of community and state responsibility for this problem group. Many conventional social and medical agencies state that the problem is not their responsibility. These offenders are on Skid Row; therefore they are the responsibility of the Salvation Army or the Volunteers of America. The police frequently say it is the responsibility of the courts, the courts counter with the duty of the penal institutions, and the latter counter-attack with

the responsibility of health and mental hygiene agencies. The net result is that no institution or person assumes responsibility for the social problems of these men. Thus, America continues to clutter its courts and jails with individuals whose 'crime' is a physical and social illness."

Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 1, 42, 139, 142 (1958).

"In fact, an analogy can be made between contemporary society's philosophy and methods in dealing with chronic inebriates and the conditions and beliefs that Dorothea Dix discerned in the 19th century with respect to the mentally ill.

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"On the cultural front, the individual who is constantly arrested and imprisoned has a stigma attached to him by the rest of society and is outside the pale of respectability. * * * In the process, the resources of the individual suffer further deterioration and the development of the institutionalized offender occurs – one whose pattern of life becomes a constant movement from incarceration to release and incarceration, with increasing dependency on the institution.

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"Community attitudes, however, define the public inebriate as a nuisance who must be either fined or jailed. Some segments of the community seem to feel that punishment by incarceration or a stiff monetary penalty will induce the individual to change his style of living and way of life; that in the penitentiary he will grow penitent of his 'sins' and become a sober member of the community on his release.

"The results of our investigation negate completely the assumption that incarceration acts as a deterrent to the chronic public inebriate. Of the 1,357 men committed in 1954 on charges of public intox-

ication or allied offenses, only 5 were newcomers to prison life.

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"The present system is not only inefficient in terms of the excessive cost of jailing an offender 30, 40, or 50 times, but is a direct negation of the society's humanitarian philosophy toward people who are beset by social, mental and physical problems."

Rubington, *The Chronic Drunkenness Offender,* 315 The Annals of the American Academy of Political and Social Science 65, 66-67 (January 1958). Dr. Rubington is a Special Assistant for the Connecticut Commission on Alcoholism.

"The coexistence of drinking, and frequent arrests binds offenders to the Skid Row way of life.

"Punitive social reaction to drunkenness plays an important role in the establishment of this group membership. Arrest, the traditional reaction to intoxication, defines the offender as a person who is something less than human, thus not eligible to receive the benefits of customary social participation. Conversely, the offender is now socially defined as a member of the deviant community, thus eligible to receive the benefits of nonconformist social participation.

"Each time the offender is arrested he is exposed to the sentiments of moral indignation symbolized for society by police action. To this he responds with increasing sentiments of solidarity with the category of oppressed peoples, other offenders like himself. The increasing frequency of arrest marks the stages in alienation from society and in identification with the deviant subculture.

Logan, *Why Are We All Here?* in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 3, 5 (October 1959). Mr. Logan is Executive Director, National Association of Municipal Judges.

> "Up until today, at least, your fellow citizens have delegated to you the responsibility for handling the ugly problem that society itself so shamefully shunned – the disposition of the destitute alcoholic, the drunk of Skid Row, the outcast and homeless men and women for whom our systems of society provide no niche nor refuge – and tools they have given you to perform this Herculean task? – the night stick and the jail.
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> "There are people here who have through trial and error attained some results, and they will offer their thoughts for your consideration. But who, if not you, are in a position to offer to our society the answers which are so sorely needed in this long-neglected field? Who, if not you, are in a position to point out the ways and means to put an end to the shameful waste of millions of public dollars each year in the senseless process of repeated arrest, trial and incarceration? Who, if not you, are qualified to tell the people of your community that suffering from an incurable illness is not a crime, that throwing one type of sick man into a common jail, while not prosecuting those with comparable illnesses, is not the American way of justice? Who, if not you, are entitled to tell the City Fathers that treatment facilities adequate to the magnitude of the problem must be furnished, that the night stick and the jail are insufficient to permit you to do the job you have been given?"

Reed M., *The Function of Alcoholics Anonymous,* in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 55, 56-60-61 (October 1959). Mr. M is a lawyer who is a rehabilitated alcoholic.

> "In the meanwhile what is happening to the down-and-out, broken and defeated alcoholic? If he isn't protected by some segment of society, usually his family, he wanders the streets, sleeps anywhere he can, freezes to death in the byways. To the general public, this fellow is pretty much a nuisance, and so the public, not knowing what else to do with a drunk, has turned him over to the municipal and police courts of every city and hamlet of our country. And the judges in turn don't know what to do with him, and so they give him thirty days, sixty days, and ninety days. He keeps coming back, and so what he has, actually – and you people know this so much better than I – is a life sentence. They are the same people that you process over and over and over again. It is my belief that the police magistrate and the municipal judge who have the actual handling of these alcoholics, and who see the same alcoholics or drunks come before them time after time after time get the recognition and the understanding that this fellow is not a criminal, but that he must be a sick person.
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> "Today alcoholism is generally being handled as a crime. Tomorrow it will be treated as an illness. It will be handled by Public Health as a public health problem, and not by the courts. But in the meantime we have a transition period, and it will come slowly, because public education will require a lot of time and a lot of hard work.

Lohman, *Incarceration as a Deterrent*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 32 (October 1959). Mr. Lohman was at one time Chairman of the Illinois Parole and Pardon Board, and Sheriff of Cook County where he administered the Cook County Jail, the Country's 10th largest penitentiary. He is now Dean of the School of Criminology at the University of California in Berkeley.

> "In short, in our society it makes very little difference after a man has been to a penitentiary or a jail, *what* he has done to place him there, but it makes all the difference in the world to the society-at-large *where* he has been. They do not ask him what he did to get him put in jail. He has been in jail. He is a jail-bird, a convict. Did he steal? Was he a rapist? Is he an alcoholic? These are not the questions which the public asks. He has been in jail. One can elicit other considerations and concerns, but 'jail-bird,' – the term – that is enough. In the custody of the police, in the custody of the jailer, in the custody of the warden, in the custody of the penitentiary – so committed by the courts– this is what makes all the difference.
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> "So there is this latent effect of an attitude which is automatically produced on the part of the society toward an individual who has been subjected to this experience of stigma and corresponding rejection – second-class status.
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> "It follows that the jail is the last place that one ought to think of sending an alcoholic. * * * In the case of alcoholics, we must avoid the change of individuals from persons who are in the early stages of alcoholism, remove them from a degrading process initiated by the law itself that causes them to lower their esteem so that there is no prospect at all for integrating them into conventional society.

> "Let me put this another way: I regard jailing the alcoholic in America today, – (and I say this out of my experience of four years of administering one of the largest monstrosities, if you please, of America, the Cook County jail) – as far as the abandoned cases, the desperate cases – represents a completion of the degradation of those individuals to a point of complete absence of self-esteem, by failing to provide a true answer to their problems in their earlier days."

The Correctional Association of New York and the International Association of Chiefs of Police, *Alcohol and Alcoholism: A Police Handbook* 11, 30 (1965).

> "Alcohol in large doses is a narcotics and some people can become dependent or addicted. This is typified by the alcoholic whose drinking is undeterred by warnings, fines or jail sentences. Such people are in need of specialized medical treatment.
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> "Never lay stress on a person's seeming inability to handle drink like other people. It humiliates and angers him to have this pointed out, and raises his wall of defensiveness or defiance, making any attempt to reach and help him more difficult. Remember that anger, lectures or scoldings for the most part *only tend to drive the alcoholic more towards drink.*"

Brunner-Orne, *The Role of The General Hospital in The Treatment and Rehabilitation of Alcoholics,* 19 Quarterly Journal of Studies on Alcohol 108, 114-115 (March 1958). Dr. Brunner-Orne is Chief Psychiatrist, New England Hospital, Boston.

> "It appears evident that some of the older methods used in the fight against alcoholism have been failures. Social ostracism and jail sentences have proved as ineffective as the attempt to outlaw alcohol by national prohibition. The more realistic contemporary approach to the problem appears to offer a much better outlook. Nevertheless, hundreds of alcoholics are still arrested every day and kept

in jail at considerable cost to the community, without any improvement of the situation."

Block, *Alcoholism: Its Facets and Phases* 60-61, 134-135 (1965). Dr. Block is former Chairman of the American Medical Association Committee on Alcoholism.

"One cannot legislate against a disease. Nonetheless, many attempts have been made through the years to handle the problem of alcoholism through legal methods. When treatment for mental patients was limited to punishment, the same theory – that such patients were possessed by an evial spirit that could be driven out by beatings or other abuses – was applied to alcoholics. It was thought that punishment would teach them not to drink, thus eliminating the objectionable behavior. Little thought was given to the reasons for their excessive drinking; the only objective was to make them stop. As is usual when such an approach is used, punishment failed to deter those who drank.

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"No attempt was made to determine the reasons for such behavior; the offense was deemed deliberate, and punishment was meted out as a deterrant to future offenses. Even the slightest understanding of the compulsive character of alcoholism should expose this fallacy. The term *compulsion* in itself explains why certain persons have no control over their actions, and, thus, why punishment is useless. Only proper treatment will have any effect upon the alcoholic.

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"The homeless alcoholic can be defined as a person who has no family or is not in contact with his family, and whose domicile is determined by where he happens to be. If he is employed, it is usually on a day-to-day basis. He has no intimate friends, but only acquaintances in the Skid Row area. Like other alcoholics, the homeless alcoholic drinks alcohol excessively. He may or may not be a compulsive drinker, but in most cases his main interest is

to obtain and continue to drink alcohol, with little regard for himself or his surroundings. His excessive drinking may be periodic or continuous. He has the same characteristics, in many instances, as other alcoholics, to which is added homelessness.

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". . . this individual has arrived at the lowest point of the disease."

Report of the Committee on Prisons, Probation, and Parole in the District of Columbia 86, 90, 92, 95, 99, 113, 123 (April 1957).

"The 'Skid Row chronic alcoholic' is the individual who now burdens the police, clogs the courts, and over-crowds the prisons. He is almost always unable to establish collateral or pay a fine. Unlike the 'social alcoholic', he is asocial, i.e., he does not have a home, a wife or children living with him, a job, or any social belongingness within the community. He lives on a day-to-day basis, and his time is taken up in drinking whatever he can lay his hands on. He appears unable to work steady on any one job. His psychiatric diagnosis points to difficulty in treatment and possible need for a confinement in an institution. His present social and economic resources, past adjustment, and motivation to do something about his drinking habit are all poor and he is strongly dependent on the Workhouse as a place to live, and to do what little work he can.

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"The Committee believes this indicates that our court-jail problem could be eased considerably if the policemen on patrol were encouraged to make a more determined effort to send a greater number of these weekend drinkers directly to their homes. It also indicates, particularly for the first offender, the desirability of devising a somewhat fairer procedure for his release without formal charge when his case is one of simple intoxication.

* * *

"Present procedures are failing to reduce the growth of the overall alcoholic problem in Washington. Not only are more arrests being made involving more people, but the procedure apparently has very little affect as a deterrent to the individual.

* * *

"It is obvious, therefore, that the chief results of 'drunk' arrests at the present time are (1) to keep intoxicated individuals off the streets and, (2) to make the Nation's Capital unattractive to transient Skid Row alcoholics.

* * *

"However, the continuing growth of the problem in Washington leads us to conclude that police procedures, i.e., arrest and collateral, must be harnessed to contribute in a more positive way to controlling and reducing the overall alcoholic problem in the District.

* * *

". . . we cannot, ipso facto, say that the statistics show that a considerable number of these individuals engage in serious crime. To the contrary, the great majority of our 'Skid Row alcoholics' exist by panhandling and, occasionally, doing a day's work.

* * *

"The 'drunk' problem is a human problem, and an appreciation of both the problem and the futility of the present treadmill – arrest, collateral-fine, or jail – can best be gained by a look at the human products of the system.

* * *

". . . scores of chronic alcoholics who, as an examination would show, need treatment and institutional care for an indeterminate period, are sentenced time after time to short terms in the Workhouse – a procedure which neither benefits them nor the community."

"Rehabilitation of Alcoholics," *supra* at 26 n. 56.

Private Estes of the District of Columbia Police Department, at 28.

> "Well, I would say I let four go to the one I lock up.
>
> * * *
>
> "I would say that if a man is walking along the street and he is well dressed and you think he is a good citizen and you tell him to catch a cab and go home, why he will do it. In contrast to him, the 'smoke hound,' there is no use to tell him to go home because he won't."

Inspector Walter H. Thomas, acting Major and Superintendent, District of Columbia Police, at 30.

> "Our hearts and minds particularly go out to those individuals. We know they are derelicts, many of them, practically hopelessly involved in this alcoholic confusion."

Captain Rhoda Milliken, Head of Women's Division, District of Columbia Metropolitan Police Force, at 37-38.

> "It has been our custom in the Women's Division for many years, . . . when a woman comes in there of her own accord asking for protective custody, we give her just that and do not place a charge on the books. We mark them for investigation. When a woman is brought in drunk by a taxicab, we also book them for investigation and release them when sober. Thus, the statistics for arrest do not represent the total problem in the District. This is true of all communities.
>
> "Now I was wondering if you would permit me to say so, since the Committee has accepted the philosophy that this is an illness, that it is a public health problem. That being so, just why is it necessary to continue to keep it in the field of criminal jurisdiction? * * *

"The police have the power to pick up people who are mentally sick and send them to the proper type of institution for care and treatment, and I am just wondering if you could not consider the possibility of establishing a facility which would not be reached through the criminal courts. It would not mean that the police would not take charge of a situation where disorder and disturbances occurred. They would do the same as they now do in mental cases, which they handle every day.".

Judge Fay Bentley, District of Columbia Juvenile Court, p. 41.

"Through my experience I have been educated as it were to the point that your committee has arrived at, that alcoholism is a disease and that it is not criminal behavior, and that progress in meeting the situation cannot be made, in my mind, unless we break down in its entirety the concept that the alcoholic is a criminal.

"People who are alcoholics often say they do not want to quit drinking. They say it, not believing it, but they are afraid to acknowledge they would really like to quit because of the fact that there is so little help that they are getting and they do not like to add another failure to the situation."

Doctor Winfred Overholser, Superintendent, of St. Elizabeth's Hospital, at 59.

"So it is extremely refreshing, when one considers the fact that ever since crimes were described in the law books, that alcoholism at least in public places, was considered by the law to be a crime. It goes back a long, long ways. It has also been considered by the churches to be a sin. In other words, the era of morals has got so involved in this problem that the doctors have been pushed out in the cold, although it is fundamentally, to my mind, a medical problem. So it is extremely refreshing to find a proposition in the bill that is proposed to the effect that alcoholism is a disease. I think it is almost revolutionary, and I am delighted."

Howard B. Gill; former General Superintendent, District of Columbia Penal Institution, at 126.

> "Such amendments would recognize for the poor and shabbily dressed citizen what the police often practice now, as testified to at these hearings, with regard to the more prosperous and well-dressed drunk."

Lyam C. Duryea, M.D., Director Research Council on Problems of Alcohol, New York City, at 133, 135, 140-141.

> "Recognizing the fact that chronic alcoholism is an illness, it is considered inadmissible to center their care in correctional institutions where adequate medical facilities do not exist and where the institution of such facilities would not be in consonance with the precepts on which such correctional institutions are established and are currently operated.
>
> ". . . we are looking for information as to the proper manner of handling the fellow who is a chronic alcoholic, regardless of what the reasons were back of him becoming an alcoholic might have been. He is one, and now how are we going to handle him, or is there anything which can be done?
>
> "Our jails were never conceived of as being medical institutions for the care of the chronically ill. However, because of existing laws, failure heretofore to recognize alcoholism as basically a medical problem and lack of facilities in which to treat alcoholics as such and as an underlying factor in criminality, our jails have become in effect chronic-disease hospitals."

Michael M. Miller, M.D., who was director of the first court clinic for alcoholics in Cleveland, Ohio, founded in 1940, and helped found the District Alcoholic Clinic, at 144.

> "Some misconceptions have arisen with regard to what can be done for the alcoholic patient. These are due largely to the fact that in the past alcoholics were treated by penal incarceration and lack of

medical, psychiatric, and social aids. No prisons have been established for providing such treatment on a large scale. The alcoholics were considered in the same category as criminals rather than as ill people, and the attitude of the courts has been largely punitive.

"It is a major tragedy which has been visited upon the American people – the failure of our public agencies to recognize that the cause of alcoholic addition is psycho-social maladjustment rather than premeditated efforts upon the part of those very unhappy, unfortuate people to aggress society. For every alcoholic who is subjected to our inhuman, punitive treatment by the courts as in the past, many innocents have been made to suffer to a far greater degree frequently than the afflicted person, namely the family, the wives, and children, and the employer, as well as the community. I have at numerous times observed children without food because judges have levied a fine upon a low-income individual. Why must society seek revenge upon these unhappy sick people?"

Murtagh, *The New York City Program for the Skid Row Alcoholic*, in *Proceedings of Institute on the Skid Row Alcoholic of the Committee on the Homeless Alcoholic, National Committee on Alcoholism* 4 (March 1956). Judge Murtagh is Chief Magistrate of the Magistrate's Court, New York City.

"Night after night, in one city after another, we find the police picking up drunks on the street and locking them up in the 'drunk tank.' In the morning they are released or sentenced to a short term in jail, only to be picked up again soon after their release. Virtually all of these chronic drunks are recidivists. Many of them have records of hundreds of arrests. This futile procedure can not be defended, but it goes on day after day throughout the nation. It is truly a national disgrace. The penal approach to the Skid Row derelict is expensive, profitless, and inhumane."

APPENDIX H

Law Review Comments on the *Driver* and *Easter* Decisions[1]

Casenote, 8 Ariz. L. Rev. 351, 356 (1967):

> "The Court of Appeals for the Fourth Circuit rendered a courageous decision in the *Driver* case. Reacting to recent medical findings concerning the nature of chronic alcoholism and widespread revulsion at the criminal treatment of alcoholics, the court took a step toward solving the dilemma of the 'revolving door' drunk. The result is just, for the addict and for society. Where conduct cannot be controlled, there is no reason for punishment. Neither deterrence nor rehabilitation are served, and imprisonment for the sole purpose of sequestration is inhuman."

Case Note, 15 Cath. U. L. Rev. 259, 263 (1966):

> "The nexus, then, between an illness and the ban against cruel and unusual punishment seems to have been supplied by the *Robinson* holding . . . . The Fourth Circuit in *Driver v. Hinnant* simply took the next logical step, one foreseen by Mr. Justice White. It applied the ban to criminal convictions for public manifestation of disease symptoms."

2 Colum. J. of Law & Soc. Prob. 109, 130-131 (1966):

> "The overwhelming opinion of correctional officials and police court judges is that the penal approach should not be continued. * * *
>
> "The objections of judges and correctional officials reflect their judgment that alcoholism is really not a police matter, but should be treated as a social service problem. Repeated incarceration does not help the alcoholic to avoid future public intoxication; in fact, such punishment lessens his chance

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[1] All footnotes have been eliminated from quotations.

of breaking the 'revolving door' cycle. The coexistence of drinking and frequent arrest binds offenders to the Skid Row way of life. The jailing of the already socially disintegrated skid-row alcoholic is going to prevent any chance of self-improvement and reinforce his previous pattern of life. And for some skid-row alcoholics, jail may become a final resting place either because of the lack of treatment or through suicide."

Note, 52 Corn. L. Q. 470, 476, 478 (1967):

"Some courts have expressed the fear that there will be many 'pretenders' to the status of alcoholism who are not, in fact, suffering from the disease. This objection alone would appear insufficient to prevent the genuine alcoholic from obtaining justice. No one would claim that insanity is easy to identify, yet our sense of justice requires that an insane person be excused from criminal liability under certain circumstances. There seems to be no more difficulty in identifying alcoholism than in identifying insanity, and the demands of justice are equally strong. * * *

* * *

"Chronic alcoholism, a major health problem in the United States, has until recently been treated by the law as a penal problem. The decision . . . indicates that a trend is developing toward a more constructive and humane solution – medical care in hospitals in lieu of incarceration for penal purposes in the penitentiary."

Note, 1966 Duke L. J. 545, 551-553 (1966):

"One circuit has already adopted the *Driver* rationale with respect to chronic alcoholism, and *Driver's* extension of the 'status' rule of *Robinson* to encompass 'involuntary *symptoms*' of the status will have widespread effect if it is similarly adopted by the other circuits. First of all, approval of the *Driver* rationale can mean the end to the inhumane treatment of the alcoholic who, as a victim of 'street cleaning operations' employed by the police in lo-

cales such as the skid-row areas of the larger cities, finds himself perpetually passing in and out of jail without any attempt to rehabilitate him. By its decision, the court places the responsibility for the chronic offender squarely in the hands of the public health agencies. This approach offers hope to all alcoholics, particularly those in the early stages of their illness who previously were subjected to a recurrent cycle of arrest and jail, thus lowering the prospect of integrating them into conventional society even if their condition was curable."

Note, 52 Ia. L. Rev. 492, 511 (1966):

"If change does come to the legal status of the alcoholic, it will be slow and will have to be led by the liberal courts rather than the legislatures, where the alcoholic seems to have no champion."

1966 U. of Ill. L. Forum 767, 772 (1966):

"A 'revolving door' policy, however, is not the answer to the problem of the alcoholic. Nor is penal incarceration of any kind a solution."

Recent Case, 55 Ky. L. J. 201, 205-206 (1966):

"The significance of this decision lies in the fact that a new approach is applied to the age-old problem of chronic alcoholism and its punishment under the criminal law. 'Traditionally, we have tried to meet the problem of alcoholism by penal law. But there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the laws against drunkenness.' Perhaps the *Driver* case best illustrates the truth of this statement. The number of times Driver was convicted indicates the futility of his prison terms. Neither deterred nor rehabilitated, he and others like him are daily released again into society."

Recent Case, 43 N.D. L. Rev. 551, 553 (1967):

"Notably, cruel and unusual punishment has been defined as that which shocks the conscience of rea-

sonable men and must be considered in the light of developing civilization. Thus, newly developed advances in psychology and psychiatry and the enlightened treatment available for mentally disturbed people necessitate a re-evaluation of punishment of the alcoholic; and it surely does shock the conscience of reasonable men that the only recourse of the courts is to stigmatize his behavior as criminal by jailing him."

Comment, 18 S.Car. L.Rev. 504, 508 (1966):

"As a result, Driver, age 59, has spent two-thirds of his life in jail. This seems appalling, yet statistics show that there are approximately five hundred thousand men and women similarly situated in the United States. Of the two million arrests made annually in the principal cities for all crimes, forty percent are made under public intoxication statutes, and an additional ten percent are for disorderly conduct which usually involves public intoxication.* * *

"An end to this maltreatment will come only when society decides to face up to the problem and accept the fact that the chronic drunkenness offender is not a criminal but is a sick person who not only needs but deserves a chance to redeem himself from his pathetic way of life."

Note, 12 S. Dak. L. Rev. 142, 148-149 (1967):

"Criminal punishment of alcoholics has been found to be an unsatisfactory method of dealing with the problem since it seldom deters or rehabilitates. * * *

* * *

"Although facilities and funds are not available to handle a problem the size of civil treatment of alcoholics, this is not a reason to condemn the court's determination that alcoholism is a sickness and not to be punished criminally. This is an example of the legal system accepting knowledge and change from the social system."

Comment, 11 St. Lou. Univ. L.J. 250, 260 (1967):

> "Criminal conviction and punishment of the chronic alcoholic – even merely branding such individuals criminals – seems neither just nor civilized. * * * Recent advances in medicine and psychiatry have wrought great changes in our system of criminal law. Insanity and drug addiction are now considered diseases whose remedies are medical and psychiatric, not penal. Perhaps the courts are finally recognizing that chronic alcoholism warrants the same treatment."

Note, 41 Tul. L. Rev. 140, 141, 148 (1966):

> "Implementation of the reforms *Driver* seeks to encourage is a laudable and necessary goal, since the present system of punishing chronic alcoholics is ineffective and in need of revision. * * * Clearly, the public policy considerations behind the *Driver* decision are sound.
>
> * * *
>
> "Community inaction in this area has been attributed to a variety of causes, ranging from Biblically-oriented sentiments that all excessive drinking is a 'sin' and therefore should be punished, to scepticism about the value of enforced civil commitments. Regardless of the cause, the fact remains that changes in the present system are unlikely without intervention by the judiciary."

Recent Development, 11 Vill. L. Rev. 861, 868 (1966):

> "It is submitted that the instant cases are correct, both in applying the rationale of *Robinson* to alcoholism and in extending it to include symptoms of the disease."

Case Comment, 23 Wash. & Lee L. Rev. 401, 411 (1966):

> "Despite these and other unanswered questions, *Hinnant* brings the criminal law a step closer to a true reflection of the values of our civilization."

NOV 21 1967 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967.

No. 405.

POWELL

v.

TEXAS.

On Writ of Certiorari to the County Court of Travis, Texas.

MOTION OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION AS AMICUS CURIAE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1967.

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TEXAS.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF TRAVIS, TEXAS.

MOTION OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Philadelphia Diagnostic and Relocation Services Corporation respectfully moves this Court for leave to file the attached brief in this case as *amicus curiae*, consent to the filing of a brief by the Diagnostic Corporation not having been obtained.

The applicant, Philadelphia Diagnostic and Relocation Services Corporation, has an interest in this case by virtue of its role as a non-profit, government-supported social agency engaged in the treatment and study of the class of persons represented by petitioner.

Specifically, the Diagnostic Corporation (together with its predecessor, the Diagnostic and Relocation Center) has since April 1963 operated a program which consists of providing services to Philadelphia's skid row population and investigating the two phenomena of skid row: the individ-

ual and the institution of skid row. Because a significant proportion of the skid row population are chronic alcoholics and because these men also represent, as a class, the most numerous violators of the public intoxication laws, both the service and research facets of the Diagnostic Corporation have been much concerned with the matter now before the Court.

Based on its accumulated experience, the Diagnostic Corporation has concluded that treating the chronic alcoholic as a criminal has a negative effect on the overall community effort to deal in a meliorative way with the social and individual problems posed by the skid row alcoholic. It is the Diagnostic Corporation's concern, as an involved agency, with the development of more effective and more humane community approaches for controlling and remedying the social malady exemplified by petitioner, that identifies its interest in this case.

The case law applicable to petitioner's case is well known, and the Diagnostic Corporation is certain that it will be amply briefed by the parties. However, the Diagnostic Corporation is in a unique position to present to the Court the sociological insights derived from pragmatic experience that are relevant to a resolution of the legal issues.

Situated as it is both professionally and geographically in the midst of the population providing the lion's share of persons arrested for public intoxication, the Diagnostic Corporation is uniquely qualified to furnish the Court with this pertinant information. Factual matters relevant to dispostion of this case have been explored in great depth by the Diagnostic Corporation and the results have been or are awaiting to be published in numerous periodic reports. Notable among these reports are the following: an examination of the role of law enforcement in relation to the skid row man, Blumberg, et al., *The Homeless Man and Law Enforcement Agencies*, 45 PRISON JOURNAL 29 (1965); the technical report contracted for by the Depart-

ment of Housing and Urban Development relating the findings of the initial three year study of the skid row male; and the results of a ten-day pilot project testing non-penal procedures for dealing with public intoxicants.

Results of the general studies of the skid row population bear relevance to a) an understanding of the syndrome of the chronic alcoholic, b) the effects of criminal disposition on that person, and c) the possibility of efficacious alternatives for dealing with the problem. These considerations have significance in this case insofar as the data compiled by the Diagnostic Corporation tend to show that the chronic alcoholic does not voluntarily violate the drunkenness laws, that law enforcement is unsuitable as a remedy from the standpoint of society and the alcoholic, and that the assertion that penal incarceration is the only resort for the chronic alcoholic is erroneous.

It is believed that the ten-day pilot project conducted by the Diagnostic Corporation and noted above is especially relevant to a decision herein. The project was undertaken with the cooperation of the Philadelphia Police Department and District Attorney in response to the decision in the Philadelpia Court of Common Pleas that habitual intoxication may not be made a criminal offense. *Commonwealth ex rel. Lee v. Hendrick*, — D. & C. — (Phila. 1967).

The results of the project indicate that it is both feasible and desirable from the standpoint of the chronic alcoholic, the police, and the community-at-large to administer a program for the control of public drunkenness apart from customary law enforcement channels. This finding implies that a decision favorable to petitioner need not create greater problems than it solves.

If the foregoing arguments are approved by this Court, the decision of the court below must be reversed.

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BRIEF OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION AS AMICUS CURIAE.

By leave of this Court, the Philadelphia Diagnostic and Relocation Services Corporation files this brief as *amicus curiae.*

INTEREST OF THE AMICUS CURIAE.

The *amicus curiae,* Philadelphia Diagnostic and Relocation Services Corporation, has an interest in this case in that its primary function involves the treatment and study of the skid row alcoholic, the class of persons who will be most affected by a decision herein. In its capacity as a diagnostic and relocation service agency, *amicus* is concerned that the skid row alcoholic be rescued from the margins of society and be restored to a state of human dignity.

As a research program, *amicus* believes that its expertise and specialized experience as respects the subject matter enable it to furnish the Court with sociological data and insights that may be of aid in arriving at a proper disposition of the legal question of whether chronic alcoholism is a defense to a charge of public intoxication.

SUMMARY OF ARGUMENT.

Subjecting the chronic alcoholic to criminal penalty for public intoxication is incompatible with the objectives of criminal law and fails to comport with modern sociological approaches to the homeless inebriate upon whom the penalty most frequently falls. Effective alternatives to punishing the alcoholic offender have succeeded in practice to the benefit of the alcoholic, the police, and the community-at-large.

ARGUMENT.

It is *amicus's* contention that the prevailing system of penalizing the chronic alcoholic who commits the offense of public intoxication cannot be reconciled with the purposes of law enforcement and criminal justice nor justified by a rational social policy. *Amicus* intends to show that whatever social interests are allegedly served by making the alcoholic a criminal are ultimately defeated in the same process. The final purpose of this brief is to demonstrate that the consequences of a ruling favorable to petitioner will be to alleviate rather than aggravate the enormous social problem dramatised by this case.

The strikingly disproportionate number of arrests for drunkenness nationally in relation to the number of arrests for all offenses has been widely commented upon. See e.g., The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 233 (1967) wherein it is reported that one-third of all arrests in 1965 were for drunkenness. In urban centers including among their population numbers of homeless men residing in decayed surroundings commonly referred to as "skid rows" or words of like effect, the proportion of drunkenness arrests to all others is most pronounced.

Figures for Philadelphia indicate that over a period of years this proportion appoaches fifty percent. Philadelphia Police Department, Statistical Report 1965, 16 (1966). San Francisco, to take just one more example, reports comparable statistics. See Levin, *The San Francisco Court School for Alcoholism Prevention,* 53 A. B. A. J. 1043 (1967). The very improbability of these figures constitutes a reproach to the national community and challenges the efficacy of existing programs which society's institutions, including the law, have responded with to implement the condemnation of public drunkenness.

Explanation for the extraordinary number of arrests for the crime of public intoxication lies with the nature of its most prevalent offender, the chronic alcoholic living on the fringe of society. Although the skid row alcoholic comprises but a fraction—perhaps two to three percent based on the evidence in Philadelphia—of an estimated alcoholic population of five million persons in the United States, see Roche Laboratories, *Aspects of Alcoholism* 30 (1963), his homelessness and abject appearance make him highly visible and thereby uniquely prone to the snare of law enforcement.

Of the upwards of 40,000 arrests annually in Philadelphia for drunkenness, nearly one-quarter are reported by the police district in which the City's skid row is located although the district contains but two percent of the City's total population. Nolan, A Report on Alcoholism (Appendix II) (Unpublished Study presented to the Penna. Crime Commission Special Offenses Task Force, October 20, 1967). That a relatively small and discrete class of persons can be responsible for a staggering number of offenses is accounted for by the high rate of recidivism among the class of drunkenness offenders. Police and magistrates dealing with the public intoxicant on a daily basis have long been aware of this fact, but it has rarely been documented.

A review of drunkenness arrests for the first seven months of 1967 in the Philadelphia police district having the largest incidence of such arrests indicated that more than fifty percent of those arrested experienced more than one arrest for drunkenness during this brief time span. Ten or more arrests of the same person were not uncommon, and a few unfortunates appear to have been arrested on at least a weekly basis. *Id.* A recently completed ten-day pilot project undertaken by *amicus* in this same district in cooperation with the Philadelphia Police Department and District Attorney for the purpose of evaluating non-penal procedures for the handling of drunkenness offenders, produced corroborative data. Many of those

individuals identified by medical and psycho-social diagnoses as alcoholics reported a history of fifty or more arrests for drunkenness.

This information is relevant for the purpose of showing that the gross prevalence of the crime of public intoxication is largely attributable to a group which may be characterized as homeless or skid row alcoholics. This fact in turn raises questions as to the legitimacy of applying criminal sanctions to a person who, by definition, is incapable of avoiding the proscribed conduct, is undeterred by the threat of punishment, and whose debility is aggravated by society's reliance on police restraint of his behavior.

The skid row (as distinguished from his more affluent counterpart) alcoholic tends to be guilty of repeated violations of the drunkenness law because he is afflicted with a disorder that compels his drinking to intoxication—a fact found by the court below in consonance with virtually all medical opinion—and because his pattern of life dictates a high exposure to public view.

What causes a person to become an alcoholic is an unresolved controversy, but it is clear that a society which condones and in many circumstances encourages the use of alcohol, impliedly accepts the risk of producing in those who are susceptible, for whatever combination of physiological or psychological factors, a state of alcohol addiction. It begs reality to hold the alcoholic culpable for the symptoms of his addiction on the ground that his conduct was voluntary in the first instance of his consuming alcohol. If the consequences are unforeseeable, one may not be held to account for doing what is socially expected.

The skid row alcoholic manifests the customary symptoms of the addiction: the psychic compulsion to drink, the development of physiological tolerance creating the need for increased quantities to satisfy the body's craving, and the agonizing withdrawal when the craving is unsatisfied.

In addition to these symptoms common to all alcoholics, the derelict who is so afflicted displays a range of infirmities altogether pathetic.

Typically, the skid row alcoholic is over fifty years of age and has had a long drinking history marked in its advanced phases by the consumption of non-beverage alcohol such as canned heat, blackouts, convulsions, and fits of delirium tremens. His characteristically scrofulous demeanor is the result of the malnutrition brought on by an exclusively liquid diet. In this debilitated condition he is vulnerable to a host of diseases, many all but eradicated in the general population; nine percent of the men arrested in the course of the pilot project had a history of tuberculosis. Despite his organicity he is as likely to be killed by an automobile as from all other causes of death.

When the derelict is sheltered at all, it is in the meanest of accommodations, and refuge may just as frequently be sought in the doorway, the parked vehicle, the condemned building, and the alley. He is prey to beatings when drunk and to other forms of exploitation even when sober at the hands of the parasitic components of the skid row environment who profit from the perpetuation of his degradation. His employment history is irregular, and the periods of unemployment lengthen with the hardening of the addiction. Psychologically, his personality is inadequate to the point of being shattered, divesting him of the will to regain a measure of dignity.

The point to be made by this rendering is that the skid row alcoholic desperately requires some measure of institutional control for his own protection. Obversely, the community needs protection from the downtrodden alcoholic who poses a threat of injury to the vehicle operator, a nuisance and sometimes worse to the pedestrian, and a general offense to public sensibilities. *Amicus* does not question society's right in these circumstances to adopt those measures which are necessary to prevent the injurious con-

duct, notwithstanding the fact that it flows from an involuntary status. What is in issue is whether law enforcement is an appropriate instrument for discharging this function.

Measured against the traditional objectives of the criminal law, the only arguable justification for the imposition of criminal penalties on the chronic alcoholic is the protection afforded his person and society while he is confined. Of deterrant value there can be none operating upon an agent who lacks self-control in relation to the consumption of alcohol. The recidivism rate among the alcoholic population evidences the ineffectuality of the threat of punishment for reducing their commissions of public intoxication.

As respects the thesis that the protection afforded all parties justifies penal incarceration of the chronic alcoholic, it is submitted that the immediate value of short-term confinement is achieved at the expense of perpetuating the need for protection. Whatever safety is gained by jailing the alcoholic is transient, lasting only as long as the confinement itself. Upon his release, the alcoholic recommences the cycle of drinking, inebriation, and helplessness. The intervention of law enforcement merely adds an additional phase to the cycle, a phase without claim to remedial value except insofar as it postpones the consequences it is inoperative to deter.

The application of criminal sanctions against the alcoholic for the involuntary display of his symptoms is at variance with traditional norms of criminal law in the further respect that in order to convict the alcoholic, a court suspends, in effect, the common law requirement that conduct be bottomed by the actor's volition. It is precisely the loss of the volitional capacity in relation to the use of alcohol that defines the alcoholic's disability; convicting the alcoholic for being intoxicated is analogous to punishing a senile person for being incontinent and equally bereft of fairness.

The negative affect on the alcoholic of jailing him and labeling him a criminal is not offset by the temporary benefit he derives from the food and shelter provided at the state's expense. This is not to minimize the humane service provided by the police and prisons, frequently the skid row alcoholic's sole source of care. It is to say that in focusing on the beneficial aspect of penal confinement, the tendency is to overlook its unfortunate ramifications which may be to reinforce feelings of self-contempt thereby insuring the permanency of the skid row way of life. In the words of one scholar,

> The constantly incarcerated individual finds it nearly impossible to maintain a meaningful marital and family relationship; his ability to find employment is seriously jeopardized by his arrest record. . . . By constantly being officially labeled by the police, the courts and correctional institutions as a public drunk, he begins to see himself as a public drunk; the jail becomes little more than a shelter to regain his physical strength.

Pittman, *Public Intoxication and the Alcoholic Offender in American Society,* attached as Appendix A to President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society—Task Force Report: Drunkenness 10 (1967).

The act of conferring a right on the police to arrest the skid row alcoholic as a criminal lends itself to an interpretation in the public mind that responsibility for the welfare of the derelict also rests with the police. As a result, society has tended to abnegate its responsibility to improve the lot of this stricken group. The availability of the criminal expedient has thereby had the incidental consequence of reducing the pressure for needed research in this area and the establishment of adequate treatment facilities. Not only is the alcoholic's disability exacerbated by subjecting him to criminal sanctions, but his prospects

for eventual treatment and recovery are also diminished by resort to law enforcement.

The police are not without a function to play in the field of public health. As guardians of society, they are as fitted in some circumstances to protect the community from the harmful consequences of disease as from those of conscious wrongdoing. For this reason the police are empowered to take into custody carriers of serious contagious diseases. Such persons are hospitalized, however, and not jailed. A similar approach might well be appropriate for the disposition of the alcoholic who endangers public safety, and civil commitment procedures may be suited or adopted to this end.

But for the limited purpose just described, the agencies of law enforcement are unsuited for the role of public health officers which existing practice thrusts upon them. The police are neither trained nor equipped to administer to sick persons, or, more critically perhaps, to know when a person is in need of medical care as opposed to merely being intoxicated. A recent incident in Philadelphia wherein an alcoholic offender died in the "drunk tank" of a local police station is noteworthy not because it exposes police irresponsibility, but because it exemplifies police limitations and the frustrations to which they are heir so long as they are cast in the role of caretaker to the publicly intoxicated alcoholic. Policemen in districts having a high incidence of drunkenness who must arrest the same individuals on virtually a nightly basis can only be aggrieved by the enormous quantities of time and manpower diverted from normal police functions into what is essentially the field of public health. For a police officer's view, see Nolan, *supra* at 17, where he estimates that 60,000 man hours were lost in Philadelphia during the first seven months of 1967 to the arrest and processing of drunkenness offenders.

In light of the foregoing, the only remaining justification for persisting in the present course of relegating responsibility for the alcoholic to law inforcement would be

the absence of efficacious alternatives; such is the claim of those who maintain that incarceration is the only recourse for dealing with the skid row alcoholic. This attitude is belied by the experience of practitioners. The alcoholic, and particularly the skid row alcoholic, is not easily treated nor is recovery easily come by; yet, with proper therapy and sufficient support substantial improvement and recovery are attainable. In the irremediable case, the only solution may be commitment to a long-term facility much as it is the only solution in cases of extreme mental illness.

Herein, the four and one-half years experience of the Philadelphia Diagnostic and Relocation Services Corporation is enlightening. Originally conceived for the purpose of complementing the physical renewal of downtown Philadelphia with a program of human renewal for the homeless men displaced by urban redevelopment, the Diagnostic Corporation (then Diagnostic Center) quickly realized that treatment for alcoholism was a prerequisite for effectively servicing and relocating this population.

A program for rehabilitating alcoholics was devised utilizing thorough diagnostic and evaluative services—medical, psychological, and, psychiatric—counselling by personnel trained and experienced in helping the alcoholic, a Halfway House program currently in the process of expansion, and referrals to the Eagleville Hospital and Rehabilitation Center, a facility offering long-term treatment for alcoholics developed in 1966 with the active support of the Diagnostic Corporation.

A major contributant to the success of the program has been the procedure of using recovered alcoholics in a "contact" capacity; their ability to gain the confidence of the alcoholic and their status as living examples of the possibility of recovery are of immeasurable importance in initiating treatment. A number of persons who have been through the program have subsequently been employed by the Diagnostic Corporation in various capacities, evidence of the possibility of reintegrating the alcoholic into the com-

munity in a productive capacity. Provision of vocational training and aid in finding employment are services designed to further this objective.

Financing of the broad range of services offered by the Diagnostic Corporation has been achieved largely through Federal and State funding. It appears that existing programs may be drawn upon for financing local efforts in alcohol treatment, meaning that their development need not be contingent on the creation of wholly new sources of revenue.

A relevant consideration in resolving the issue at hand is the likely effect of a decision favorable to petitioner. Should such a decision be thought to result in greater social dislocation than its remedies, its propriety might be doubtful. The recent experience of Philadelphia in the wake of a judicial ruling that it is constitutionally impermissible to convict for the crime of habitual intoxication, *Commonwealth ex rel. Lee v. Hendrick*, — D. & C. — (Phila. 1967), is pertinent to this inquiry.

The initial reaction in the community to the court decision was the determination by responsible officials that the supervision and welfare of the publicly intoxicated alcoholic were matters of community concern. To implement this judgment, the Philadelphia Police Department and District Attorney assumed the lead in searching out alternatives to criminal punishment that would still serve to promote public safety and that of the alcoholic.

With the financial support of a civic organization, the Greater Philadelphia Movement, a pilot program was established at the police district located within skid row, the purpose of the program being to evaluate the needs of the alcoholic population subject to police arrest in relation to community resources, and to determine the administrability of non-penal procedures. The mechanics of the project involved police pickup of individuals publicly intoxicated followed by a screening process whereby doctors and alcohol specialists determined which persons were suffering from

alcoholism. Those who were in need of immediate medical care were hospitalized where they could be detoxified; others were provided shelter where they could "sleep off" the effects of inebriation; and all were offered follow-up services and treatment by social agencies.

Of the approximately 190 men who were examined during the project, it was found that most suffered illness, acute and chronic, both from the effects of alcoholism and other serious pathology. Nearly one-third required hospital care, ten percent urgently. It was clear that only a trained professional was capable of differentiating those who were in need of medical treatment from others who could be detained or discharged without treatment.

Among the further findings yielded by the study was that hospitals in the community would provide their services in deference to community needs, and that the demands made upon the hospitals were significantly lighter than anticipated and certainly of a manageable quantity. The police attached to the district were gratified by the intercession of medical personnel to relieve the sufferings of those persons whom the police heretofore had been unequipped to care for and the regularity of whose arrests amounted to an unholy and unwelcome ritual. A further benefit produced by the program was that it inspired interest on the part of many of the alcoholics to seek remedial assistance beyond the simple "drying out" process.

The project and others like it are not regarded as panaceas to the problems of the skid row alcoholic; extended treatment and adequate long-term facilities are necessary to achieve that end. But as an alternative to arrest, the program was markedly successful if only because it interrupted the treadmill existence led by the skid row alcoholic and introduced a measure of hopefulness, and because it enabled the police and courts to escape their role of accomplices in the degrading process.

The cost to the individual community entailed by the presence of a significant alcoholic population is severe in

terms of traffic and pedestrian injury, fire and accident losses, the waste of police, judicial, and prison resources, and the burden of maintaining an unproductive group within the community. Visiting the alcoholic with criminal penalties is an expedient that perpetuates these costs and postpones ameliorative efforts. An approach predicated on arresting the illness and not the man, besides being commended by its humaneness, makes possible the ultimate diminution of these social costs at a cost which is itself not prohibitive. The system of punishing the alcoholic for manifesting his illness is seen to be morally indefensible, economically unsound, and socially undesirable.

CONCLUSION.

For the reasons stated above, *amicus* supports petitioner's contention that the judgment be reversed.

Respectfully submitted,

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NO. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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NO. 405

IN THE

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October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

BRIEF FOR APPELLEE

QUESTION PRESENTED

The appellee believes that the question presented may be more precisely stated than is set out in the brief of appellant. Under the testimony adduced at the trial, the question is:

Whether imposition of a $50 fine (or 10 days in jail)[1] for public intoxication by one who habitually drinks alcoholic beverages to excess in spite of capacity to

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[1]The sentence formally pronounced was a $50 fine. In the event a misdemeanant is unable to pay a fine the Texas Code of Criminal Procedure, Article 43.09, provides for compulsory work or confinement in jail for a period of one day for each five dollars. Thus the maximum sentence which can be imposed for public drunkenness under Article 477 of the Texas Penal Code is $100 fine or 20 days confinement.

totally abstain from such drinking constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant, age 66, was convicted of "being found in a state of intoxication in a public place" in violation of Article 477 of the Texas Penal Code.[1] The state called a single witness, the arresting officer, who testified to observing the appellant at a public place on Hamilton Street in Austin, Texas. The policeman stated that appellant staggered when he walked, that he smelled strongly of alcohol, and that his speech was slurred.[2] The officer stated that it was his opinion that appellant was "very intoxicated."[3]

The defense called three witnesses. One, a police lieutenant in charge of the Austin Identification Section, identified arrest records, which indicated appellant had been arrested 72 times for public drunkenness and once for disturbing the peace. The first arrest was in 1949 and the last was the offense charged.[4]

The defense also presented the testimony of appellant, who stated that he estimated he had been arrested "about a hundred times" during his many years of drinking.[5] Appellant's testimony as to whether he felt he had will power to control his drinking was conflicting, depending on whether he was being led on direct or cross-examination.[6] The appellant did testify that

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[1] A. 58.
[2] A. 8-9.
[3] A. 8.
[4] A. 28-33, 50.
[5] A. 36.
[6] Compare, e.g., A. 37, 44 with A. 42.

he had but one drink on the morning of the trial, since he knew he had to appear in court that afternoon.[9]

Dr. David Wade, a psychiatrist especially interested in alcohol problems was the other defense witness. He testified that appellant was a "chronic alcoholic." Dr. Wade stated that appellant had the power to abstain from drinking when he was sober, although he was strongly disposed to begin drinking.[10] After his first drink, he would be unable to stop short of intoxication.[11] Dr. Wade indicated that he felt that appellant did not realize that he could not drink one or two drinks only.[12] In this respect he was contradicted by the testimony of appellant when questioned by defense counsel.[13]

The trial court entered "findings of fact" which accepted all of the premises asserted[14] by defense counsel:

1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.[15]

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[9] A. 42.
[9] A. 24.
[10] A. 26.
[11] A. 27.
[12] A. 26.
[13] A. 44.
[14] A. 51. The findings are in language which appears to be taken from the defense argument in *Driver v. Hinnant*, 356 F.2d 761, 763, (C.A. 4, 1966).
[15] A. 53.

The court in its conclusion of law held these findings not to be a defense to the offense charged."[10] The present appeal followed.

SUMMARY OF ARGUMENT

This Court is not limited by the findings of fact and extent of the record in this case, dealing, as it does, with national constitutional standards applicable to public intoxication. There is reason to believe that most persons who are convicted of this offense have capacity to totally abstain, although perhaps an inability to drink moderately. The evidence in the present case establishes appellant to be of this group.

Under established principles of criminal law appellant had an awareness of wrongdoing (mens rea) and chooses to drink and to appear in public (actus reus).

Appellant does differ from most persons enmeshed in the criminal law in a quantitative sense: the pattern of his recidivism is more extensive.

The analysis of the issues of this case cannot be facilitated by speculation concerning ancient perplexities surrounding the concept of freedom of the will. Appellant experienced freedom in the sense that we all experience freedom, and he chose, as we all choose. If one takes the presently dominant psychiatric view of man, his choices are determined by prior factors, as all of ours are. Under similar assumptions, if deemed exculpatory, no person engaging in criminal behavior is responsible.

It is also of no assistance to the understanding of this case to ask whether appellant was suffering from a "disease of alcoholism." Psychiatrists' classifications

[10]A. 53.

for medical purposes are not dispositive of problems of legal decision. In addition, since psychiatric diseases are defined as behavior disorders it confuses an abstraction from conduct with its cause to say that chronic alcoholism *caused* appellant to become chronically alcoholic. Furthermore, it is now generally recognized that the fields of psychiatry and criminal law are not mutually exclusive. They overlap. They both concern control of deviant behavior.

Conventionally acceptable purposes of the criminal law are served by prosecution of inebriates whether chronic or occasional. They are removed from the streets and placed in an environment where they become detoxified. They are given food, clothing, and shelter and a period of compulsory continence, and restriction of their liberty is for a limited period of time. From a legal standpoint, this case raises the question of whether *Robinson v. California,* 370 U.S. 660 (1962), ought to be extended beyond its express limitations to prohibit convictions for crimes involving anti-social behavior. We urge that it should not. Such has been the rulings of the cases considering the question in the context of crimes of conduct associated with narcotics addiction. On the other hand, the decision of *Driver v. Hinnant,* 356 F.2d 761 (4 Cir., 1966), while distinguishable, appears to point the other way.

Adoption of the view that habitual violation of public intoxication laws provides a defense would have revolutionary and damaging consequences to the law. Criminal behaviour of inebriates might be excused irrespective of conventional conceptions of legal insanity. Crimes of alcoholics and drug addicts may be excused upon a finding that they are a "product of ad-

diction." All crimes might also be excused if committed by a person whose pattern of deviant behaviour has been medically labeled. And the principle urged by appellant here, if accepted with full force, would exculpate all crimes if one accepted a deterministic view of man.

Finally, it is rationally doubtful if reversal of the judgment of the present case would serve habitual public alcoholics. The alternatives to criminal conviction are leaving them, if they wish, on the streets or to civily commit them to public institutions.

Treatment facilities and personnel at present and in the foreseeable future are so lacking as to be largely non-existent. And the prognosis for skid row alcoholics, who are most commonly the subject of prosecution under these laws, is extremely poor. Thus, indefinite confinement for treatment is not a rationally-compelled alternative to present practice.

ARGUMENT

1. *The Supreme Court is not limited by the "findings of fact" in this case, or by the extent of the record in the trial court.*

The first two "findings of fact," unless they are mere definitions of their terms and hence not facts at all, are conclusions of "legislative facts," to use Professor Kenneth Davis' illuminating phrase, that is to say, facts bearing on the rule of law which ought to be recognized, rather than the facts primarily relating to the particular parties to this case.[17] As such the Court may

[17]See 1 Davis, *Administrative Law Treatise* §7.02; *McCormick on Evidence*, 705-707.

act upon judicial notice and is not confined to the record in the lower court.

Obviously the rule of law applicable to millions of arrests in the United States for public drunkenness cannot properly turn on the witnesses called in a single trial or the conclusions of a single judge.[18]

Furthermore, the Court is not bound by state court general conclusions, as opposed to findings with respect to specific events. In *Watts v. Indiana,*[19] the Court stated:

> "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards are criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659, 65 S.Ct. 870, 874, 89 L.Ed. 1252, and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. [citations omitted]'"[20]

The findings in this case are not even supported by the record, the critical portion of which is the testimony of the sole expert witness, Dr. David Wade. Dr. Wade testified as follows:

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[18]We would be disinclined to belabor the point were it not for the assertion of Amici A.C.L.U. et al. that this Court is so bound (Br. 17).

[19]338 U.S. 49 (1949).

[20]*Id.* at 51.

Q But at the time that he takes the first drink from a sober condition, would you say that is a voluntary exercise of his will?

A Yes—I would like to answer that question "Yes." But I would like to say that we must take into account the fact that these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded. Again, let me reiterate that the first answer is, "Yes."

Q Could you distinguish between this type of initial compulsion from that of a compulsive eater or any other type of compulsion?

A It is the same type of compulsion. There is no basic difference between the types of compulsion."[11]

Dr. E. M. Jellinek, a leading medical writer in the field[12] goes even further:

> "The loss of control extends over a given drinking bout, after which the gamma alcoholic [a term which he applies to the dominant U.S. type of alcoholic][13] is able to 'go on the wagon,' i.e., to abstain for shorter or longer periods. His starting a new bout is not ascribable to the mechanism of loss of control nor to compulsion, but rather to an impulse whose danger either is not recognized or is 'explained away'."[14]

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[11] A. 22-23.

[12] Dr. Jellinek's work is cited by both Appellant (Br. 9, 11) and Amici A.C.L.U. et al. (Br. 3a).

[13] Jellinek, *The Disease Concept of Alcoholism* (1960), 38.

[14] *Id.* at 42. See, also Keller and Seeley, *The Alcohol Language* (1958) 21.

Thus it is unnecessary to adopt an "original sin" theory of voluntary conduct by the alcoholic, i.e., referring to decisions in earlier life, to characterize continuing use of the bottle as voluntary.

The success of Alcoholics Anonymous fully supports the position of Doctors Wade and Jellinek that persons similar to appellant can become chronic abstainers, although perhaps not moderate drinkers.[8]

2. *"Disease" is a term which is almost wholly vague; "mental disease"[9] is obsolescent as well as vague even within medical usage. It does not refer to an entity to be hypostatized or used in different contexts as if it had unitary meaning.*

Dorland's Illustrated Medical Dictionary (24th ed. 1965) states:

> "disease (Fr. des from—aise ease). A definite morbid process having a characteristic train of symptoms; it may affect the whole body or any of its parts, and its etiology, pathology and prognosis may be known or unknown."

Dr. Jellinek, after noting that the word "disease" is essentially undefined by medical professionals, asserts:

> It comes to this, that *a disease is what the medical profession recognizes as such.*"[10]

While such reference to "morbid process" and usage

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[8]See Jellinek, supra, at 41.

[9]According to the *Manual on Alcoholism* (1962) prepared by the American Medical Association, Committee on Alcoholism, Counsel of Mental Health, "Since as yet no physical etiological factor has been proven to be the cause of this illness, it must necessarily be classified as a phase of emotional illness." *Id*, at 5.

[10]Jellinek, *The Disease Concept of Alcoholism* (1960) 12 (emphasis original).

may be of some utility, albeit limited, with respect to physical illness, perceptive modern medical authorities attempt to avoid imprecise analogies suggested by the phrase "mental illness."

In their widely recognized recent text *The Theory and Practice of Psychiatry* (1966) Doctors Federick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and Chairman of the Psychiatry Department, University of Chicago, respectively, point out:

> "In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illnesses of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder . . . Whereas many cerebral diseases produce a behavior disorder, and while we believe that cerebral processes must be related fundamentally to behavior, *medically* recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders. 'The primary subject matter of psychiatry then is the disturbed or deviant behavior of the individual . . .' *Id.* at 2 (emphasis original). 'What, then, are these difficulties psychiatrists are supposed to treat, the so-called behavior disorders? Defying easy definition, the terms refer to the presence of certain behavioral patterns—variously described as abnormal, subnormal, undesirable, inadequate, inappropriate, maladaptive, or maladjusted—*that are not compatible with the norms and expectations of the patient's social and cultural system'.*" Id. at 1. (emphasis supplied)

Whether the term be "mental disease" or "illness" or "behavior disorder" it should be recognized that its use, in the last analysis, greatly overlaps the area of

behavior proscribed by criminal laws. Indeed, some psychiatrists regard *all* delinquent behavior as ill." The danger in assuming that the word "disease" has any definite meaning was vividly illustrated in *Blocker v. United States*[28] in which the Court sought to apply its *Durham* rule. At his first trial Blocker was described by medical witnesses as having a sociopathic personality disturbance, but it was stated that this was not considered a mental disease. Shortly after this trial the administrative staff of St. Elizabeth's Hospital decided to classify sociopathy as a "mental disease." The Court of Appeals ordered reversal of the conviction "on the basis of this new medical evidence," failing to recognize that the change was in the way a hospital would use a phrase.

However, the same Court later stated:

> "Our purpose now is to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."[29]

The Court might have gone further. There is no need to define the concept of disease for medical purposes and the *Diagnostic and Statistical Manual—Mental*

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[28]See, e.g., P. Q. Roche, *Criminality and Mental Illness: Two Faces of the Same Coin*, 22 U.Chi.L.Rev. 320, (1955), Karpman, *Criminality, Insanity, and the Law*, 39 J.Crim.L., C.&P.S. (1949) 584.

[29]274 F.2d 572 (C.A.D.C. 1959).

[30]*McDonald v. United States*, 312 F.2d 847, 851 (C.A.D.C. 1962).

Disorders (1952) of the American Psychiatric Association does not make the attempt.

Appellant involves himself in further error when he alleges his principal contention: The "disease of chronic alcoholism" has destroyed his will power and caused his public intoxication in the case at bar." If one classifies a behavior disorder and uses the phrase "disease of chronic alcoholism" to name it, one only adds confusion to call the disease a *cause* of deviant behavior. Stripped of obscurity such an assertion is translatable into a contention that the cause of appellant's deviant behavior was his deviant behavior. Underlying all of this, it is submitted, is the notion that "alcoholism" *really is* or is not a disease. Such an approach to the problem ignores the fundamental point that a "disease" is anything which we may wish to call a disease and that the application of such a label does not increase our understanding of the phenomenon. Appellant thus commits the fallacy of reification, the hypostasis of abstractions into substances."

If "alcoholism" were held to be a defense to a criminal conviction it would be necessary to define it for purposes of the Eighth and Fourteenth Amendments. Jellinek attempts a classification of what he denominates as "alpha," "beta," "delta," "gamma," and "epsilon" alcoholism. He also summarized 52 formulations of "alcoholism" by others." Appellant in his brief lists five definitions, the first of which is substantially dissimilar to those which follow in that it

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"App. Br. 6; See Amici A.L.C.U. et al. Br. 22-24.

"See Farnside and Holther, *Fallacy, the Counterfeit of Argument* (1959), 41-45; Szasz, *Law, Liberty and Psychiatry* (1963), 132-135.

"Jellinek, *The Disease Concept of Alcoholism* (1960) 35-58.

does not mention "loss of self-control." The phrase "loss of self-control" is itself not a model of clarity. One effort defines "loss of control over drinking" as "the inability, whether on some or all occasions, to stop voluntarily when some alcoholic beverage is ingested."[10] But the problem of differentiating between the uncontrolled drinker and other excessive drinkers remains. To state that "loss of control" constitutes "inability to stop" once drinking has begun, does not markedly advance the endeavor, except that it excludes inability to abstain. It would also be necessary to permit it to be defined so as to be operationally, clearly distinct from other excessive drinking.[11] How is the decision to be made between those who do not stop but can, and those who do not stop and cannot?[12]

3. *Anglo-American criminal law does not require taking a stand on the age-old philosophical question of whether man has freedom of the will. The United States Constitution should not be interpreted as taking a position on it.*

Amici A.C.L.U. et al. argue that our legal traditions require exculpation whenever a conclusion is made that the behavior was not engaged in as a result of "free will."[13] Similar statements have sometimes appeared in judicial decisions.[14] Amici A.C.L.U. et al. sometimes

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[10] Keller and Seeley, *The Alcohol Language* (1958) 21.

[11] See Robitscher, *Psychiatry and Changing Concepts of Criminal Responsibility* 31 Fed.Prob. No. 3, 45, 50 (1967); Glaser and O'Leary, *The Alcoholic Offender* (1966) 5.

[12] Dr. Robitscher as well as others seem to doubt that this can be done. See *op. cit.* supra, note 22 at page 50.

[13] Br., 14-22.

[14] See *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *State v. Lucas*, 30 N.J. 37, 152 A.2d 50, 75 (1959), [concerning opinion of Weintraub C.J.]

makes this argument as though it were a direct assumption of the Eighth and Fourteenth Amendments, and sometimes via an assertion that a criminal act *(actus reus),* required as a common law prerequisite of responsibility, assumes free will. On the other hand, one of the greatest contemporary writers on criminal law concludes:

> "The definition of an act in this regard is governed largely by policy. A drunkard who, in his partly insensate condition, does some injury is deemed to perform an act, though in fact his condition may be very much like that of the sleepwalker. Drunkenness is a self-induced condition; sleep-walking is not. On the other hand, an injury done in a drunken sleep receives the same exemption as any other injury during sleep. It seems that a lunatic is deemed to perform an act even where he is acting as an automaton, though he will be exempted from criminal responsibility (§ 156).
>
> Where there is consciousness, a party is capable of 'acting' even though he is subject to an uncontrollable impulse . . . An act presupposes will, but not 'free' will."[38a]

The traditional tests for legal insanity do not purport to exculpate all those lacking capacity to do otherwise. The M'Naghten Rules look to cognition not volition.[39] At the time of the survey by the American Law Institute in 1955, 30 American states followed

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[38a]Glanville Williams, *Criminal Law* (1961) 12-13.

[39]*M'Naghten's Case,* 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). "[I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

M'Naghten.[40] Even the "irresistible impulse" addition to the foregoing test (14 states) does not attempt to exculpate for non-impulsive lack of volition. Similarly, the test proposed by the American Law Institute does not propose to exclude from responsibility all those deemed to lack capacity to do otherwise.[41]

Mr. Justice Holmes was comfortable with the traditions of our criminal law and with a personally strong deterministic position.[42]

There is additional strong reason for the law to avoid a commitment on the determinism-free will controversy. To constitutionally commit American criminal law to an opposing view would create fundamental conflict between legal and psychiatric views of man. Modern psychiatry has tended to view man as controlled by antecedent heriditary and environmental factors. Freud, for example, wrote:

> "I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of a determinism which governs even mental life.'"[43]

Redlich and Freedman write:

> "As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena in our field can be explained, or that there is no uncertainty. It merely commits us to a scien-

[40]Tentative Draft 4, p. 160.
[41]Proposed Official Draft, Section 4.01.
[42]Holmes, Holmes-Laski Letters 806, quoted in Paulsen and Kadish, *Criminal Law and Its Processes* (1962), 75.
[43]*Introductory Lectures on Psychoanalysis* (1923) 87-88.

tific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences.'"[4]

The traditionally acceptable purposes of the criminal law, treatment, isolation, and deterrence are fully consistent with a deterministic view. But we do not urge its acceptance or rejection. The question of ultimate freedom or ultimate determinism is simply irrelevant, in view of the facts here.

As for the present case, it should suffice that there was a subjective consciousness of freedom to choose each time appellant began to drink, knowing that his past experience had been that he would continue to ingest alcohol to the point of public drunkenness." For the purposes of the criminal law it should not matter whether from an Olymphian point of view, appellant's decision may be attributed to unconscious impulses originating in experience in his early life, or in sociocultural factors. Otherwise there would be no criminal law and society would have no protection from behavioral deviants.

But what rational purpose does criminal prosecution of chronic inebriates serve? The acutely intoxicated are removed from the streets, placed in an environment where they sober up, and are given food, clothing, shelter and a period of compulsory continence. And the period of their loss of liberty is a limited one. Of course many are not "cured" by this ap-

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[4]*The Theory and Practice of Psychiatry* (1966), 79 (emphasis original).

[5]See Katz (ed.) et al., *Psychoanalysis, Psychiatry, and Law* (1967) 368-372.

proach. Among these are the Powells, the Drivers, the Easters.

We would underestimate the ability and energy of our opponents if we assumed that these persons were typical of the population of inebriates who have violated laws proscribing public drunkenness. Undoubtedly large numbers of such cases are not the subject of arrests at all."

Many others are freed without further effort at prosecution after a few hours of detoxification." Others are released on paying fines. Of those that remain and are sentenced to jail the great majority have records which are much less depressing than those of appellant, Mr. Driver, and Mr. Easter. In a study of a penal facility in Monroe County, New York, of a large number of "chronic police case inebriates," randomly selected, except that each which was chosen was already a recidivist and each had received a sentence for 30 days or more, the mean lifetime record of arrests was 16.5, and the median 10.2." Appellant also does not reflect the high degree of association between drunkenness and major crimes including homicide, rape, robbery, aggravated assault." A two year study by Columbus, Ohio, police of all persons arrested for felonies found that 64 per cent of these individuals were under the influence of alcohol to a degree causing reduction

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"See Report by the *President's Commisison on Crime in a Free Society* (1967) 233.

"See *Id*, at 234.

"See Pittman and Gordon, *Revolving Door* (1958) 43.

"See *Id.* at 46. Dr. Karen Horney is somewhere quoted as having observed: "The superego [conscience] is that part of the personality which is soluble in alcohol."

of inhibitions."[50] In an earlier study of 3000 admissions to Sing Sing Prison, it was found that 22 percent of the prisoners were habitually intemperate and 15 percent were intoxicated at the time of their crime."[51]

Those who violate the criminal laws always are the failures of the system. They were not deterred, and the recidivists were not reformed. One would not suggest that antibiotics should be abandoned in the treatment of syphilis or tuberculosis upon a study solely of those who were not cured, however. Yet Amici, who apparently believed excessive drinking is very much like syphilis or tuberculosis, indicate that they assume that such studies, without controls, have scientific validity."[52]

The moral condemnation implicit in criminal conviction may be useful to the overwhelming majority of the citizenry who are not public inebriates."[53] It may encourage potential alcoholics to change their drinking behavior. There is much that is not known about this enormously complex problem. That is one reason

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[50]Sharpe, *Alcohol and Crime, A Study of Urine-Alcohol Concentrations Found in 882 Persons Arrested During or Immediately After the Commission of a Felony,* 44 J.Cr. L.C. & P.S. 661-664 (1954).

[51]Banay, *Alcoholism and Crime,* 2 Quart. J. Studies on Alc. 686-716. (These investigations, together with others are summarized in Glaser and O'Leary, *The Alcoholic Offender* (U.S. Dept. of H.E.W., 1966) 11-12.

[52]See Brief A.C.L.U. et al., footnote 58 and accompanying text.

[53]It is interesting to note that the incidence of problem drinking is dramatically low in some American subcultural groups. This has been associated with inculcation of an attitude that excessive drinking is wrong, not merely "ill." See Cooperative Commission on Study of Alcoholism, *A Report to the Nation* (1967) 48; Pittman and Snyder (ed), *Society, Culture, and Drinking Patterns* (1962) 217.

not to jettison the present system of social control under the fiat of constitutional adjudication.

If the appellant's contentions succeed one may expect that an extensive history of prior convictions for intoxication will lead to exculpation, for this will in fact result in a diagnosis of "chronic alcoholism." The normally law-observant citizen who behaves similarly will be subject to criminal conviction, for his more sober history will lead to a contrary diagnosis. Such results would be unlikely to breed respect for our law.

As for mens rea, it has never been held that the legislature may not dispense with such a requirement in public welfare offenses.[8] In any event, the record in this case contains the testimony of appellant's expert that appellant knows the difference between right and wrong, at least when sober, voluntarily drinks, knows he frequently does so to the point of public intoxication.[9] Appellant possessed mens rea.

4. *Appellant's attempt to apply the rule of Durham v. United States*[10] *across the nation via the Eighth and Fourteenth Amendment should be rejected.*

Durham held that a defendant is not criminally responsible if his conduct is the product of mental disease or defect. In view of the similar contention made here it is significant that neither the appellant nor Amici cite it. The much more restrictive M'Naghten Rules have survived previous Fourteenth Amendment attack. *Leland v. Oregon*, 343 U.S. 790 (1952).

The problems of *Durham* have been manifold, and

[8] See, e.g., *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943).
[9] Tr. 22-23.
[10] 214 F.2d 862 (1954).

it has met virtually unanimous rejection by other jurisdictions. "Disease" remains almost wholly vague, subject to both restrictive interpretation and, alternatively, to construction so broad as to preclude all criminality. *Durham* did not define the term "disease" other than to state: "We use 'disease' in the sense of a condition which is capable of either improving or deteriorating.'"[9] In *McDonald v. United States*[10] the Court did attempt a definition: "'[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.'"[11] It is respectfully submitted that the Court has *not* resolved the vagueness of the test. It continues to confuse an abstraction from behavior with its cause, to rest upon metaphysical assumptions of psyche or mind, and to fail to provide a standard capable of operational use to distinguish between criminal abnormal behavior and non-criminal abnormal behavior. Furthermore, "product" in *Durham,* while initially vague, has been so sweepingly defined as to make its absence difficult, if not impossible to establish.[12]

In proposing *Durham's* rejection, the American Law Institute Model Penal Code insanity rule states:

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[9]Id. at 875.

[10]312 F.2d 847 (C.A.D.C. 1962).

[11]Id. at 851.

[12]*Carter v. United States*, 252 F.2d 608 (1957) holding that if it cannot be proven that the criminal act would not have occurred but for the disease, it is its product. This causation conclusion is inconsistent with the assertions of Amici Brief 56-57, and if "chronic alcoholism" is a "disease" for purposes of such a test, and a *Carter* causal relationship sufficies, a very substantial percentage of persons who commit serious crimes ought to be exculpated. See footnote , supra.

> "As used in this article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.'"[11]

The comments to this section state:

> "While it may not be feasible to formulate a definition of 'disease,' there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established . . . It does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.'"[12]

If the pattern set by *Durham* and *Carter* were followed by Eighth Amendment cases, it may be expected that homicide by an alcoholic robber seeking drink might be exculpated since the breaking and entering to obtain alcohol can be said to be a "product" of his "disease." The narcotics peddler who attempts to obtain money for drugs for his own addiction might be treated similarly.[13] Murder by a chronic inebriate whose inhibitions have been relaxed by liquor may be excused even though unrelated to the seeking of alcohol. Less obviously, one charged with tax evasion might find acquittal upon acceptance of defense psychiatric testimony that he suffered from a diseased condition

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[11] P.O.D. Section 4.01.

[12] T.D. 4, p. 160.

[13] More than 40% of narcotics defendants handled by the Federal Bureau of Narcotics, almost all of whom are narcotics peddlers, are addicts. *Report by the President's Commission on Law Enforcement and Administration of Justice* (1967) 219. More than 10% of New York City persons arrested for felonies against property are narcotics addicts. *Id.* at 222.

characterized by a compulsion to accumulate money.

5. *The principle of Robinson v. California ought not to be extended beyond its express limitations to nullify criminal prohibitions directed at delinquent behavior.*

In *Robinson,* the Court held that it was "cruel and unusual punishment"[10] to imprison for addiction to the use of narcotics.

The Court stated:

> "The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago in *Whipple v. Martinson,* 256 U.S. 41, this Court explicitly recognized the validity of that power: 'There can be no question of the authority of the State in the exercise of its police power to regulate the administration sale, prescription and use of dangerous and habit-forming drugs . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.' " 256 U.S., at 45."

Stating that narcotics addiction is an illness, the Court concluded:

> "We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State

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[9] The California statute was "unusual" in penalizing mere addiction. See *Robinson v. California,* 370 U.S. at 672-673 (concurring opinion of Douglas, J.). On the other hand, public drunkenness appears to be the most commonly committed offense in the United States. See *Uniform Crime Reports* (1966) 113.

[10] 370 U.S. at 664.

or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.'"[9]

The concurring opinion of Mr. Justice Douglas stated:

"The impact that an addict has on the community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime.'"[10]

The other concurring opinion, written by Mr. Justice Harlan, based its agreement on the California interpretation of its statute, which "was to authorize criminal punishment for a bare desire to commit a criminal act.'"[11] In contrast to *Robinson* the present case involves anti-social conduct, as the State of Texas has defined its norms for public behavior. To commit the offense charged defendant either became intoxicated in a public place or drank in a private place and moved to a public one. The crime is comparable to illegal possession of narcotics or firearms.

However in *Driver v. Hinnant*[12] a panel of the Court of Appeals for the Fourth Circuit granted habeas corpus to an inebriate who had been sentenced to two years confinement as a more than three-time violator within a twelve month period. With the exception of the greatly increased possible penalty, the North Carolina statute involved in *Driver* is similar to the one in the present case.

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[9]370 U.S. at 667.
[10]370 U.S. at 674. (emphasis original)
[11]370 U.S. at 679.
[12]356 F.2d 761 (C.A. 4, 1966).

The Court of Appeals based its ruling on four points: First, it found that chronic alcoholism is almost universally accepted medically as a disease; therefore its behavioral manifestations could not be a crime. The State of Texas takes the position that classification for *medical* purposes is a terminological endeavor which does not rationally advance analysis for *legal* purposes.[70]

Secondly, the Court in *Driver* stated that its decision only reached "involuntary" drinkers:

> "... [I]t is the addict"—the involuntary drinker—on which our decision is now made. Hence we exclude the merely excessive—*steady or spree*—voluntary drinker.'"[71] (Emphasis supplied.)

The testimony in the present case, in contrast to the findings, established that Powell had the capacity to abstain from all drinking, as we have attempted to point out. Leading authorities in the field also take a similar view with respect to the predominant group of persons in the United States referred to as "alcoholics."[72] Of course if one takes a deterministic position he might say that if Powell did not have the restraint to abstain, he did not have the *power* of re-

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[70]See supra, p. 9.

[71]Although not noted by the Court in *Driver*, there is a division of medical opinion on the question of whether alcohol is addicting. The defense physician conceded this in the case at bar. A. 13-14. For an opinion that it is, see, e.g., Jellinek, *The Disease Concept of Alcoholism* (1960) 39-40. For an opinion to the contrary, see, e.g., Diethelm, *Etiology of Chronic Alcoholism* (1955) 5. The problem appears to be complicated by other problems often associated with excessive drinking, such as nutritional deficiency and bodily fluid-chemical imbalance. *Id.* We do not feel that the question is critical to the *legal* issues involved in this case.

[72]356 F.2d at 764 (emphasis supplied).

[73]See *supra*, p. 8.

straint." But, as we have stated, a similar argument could be made with respect to all violators of criminal restrictions, given similar assumptions, and ought not to nullify the criminal law.

The third reason given by the Court in *Driver* was:

> "Although his [Driver's] misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable elements of a crime. *Morissette v. United States,* 342 U.S. 246, 250-252, 72 S.Ct. 240, 96. L.Ed. 288 (1952)."[11]

The Court did not support its assertion that Driver lacked consciousness of wrongdoing. Furthermore, the decision in *Morissette* was completely misunderstood. That case involved the question of whether the statute penalizing theft of government property, 18 U.S.C. 641, applied to one who thought the materials taken had been abandoned by the United States. The question was one of statutory construction, not of legislative power. Indeed, *Morissette* recognized that mens rea was not an element of many crimes."[12]

The final argument of the Court in *Driver* was:

> "Nor can his misbehavior be penalized as a transgression of a police regulation—malum prohibitum—necessitating no intent to do what punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of any imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place [illegible]y the forbiddance."[13]

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[11] See *supra,* p. 15.
[12] 356 F.2d at 764.
[13] 342 U.S. at 250-260.
[14] 356 F.2d at 764

The natural question to the assertion that Driver's presence in public was "not his act" is to ask, whose act was it?

The analogies to delirium and imbecility presumably raise a question of automatism (lack of any conscious mental state). The argument rests on a technical examination of time sequence and focuses on the moment of arrest. It urges that volitional, conscious conduct earlier in a spree of drinking is irrelevant to later unconsciousness at the time of appearance in public and arrest. If automatism due to gross intoxication were proven and declared a defense not only the habitual drinker would go free. *All* persons so intoxicated would also go free.[7] The New York Court of Appeals faced a similar question in the case of a defendant who was charged with recklessly killing four children by driving a motor vehicle, knowing he was subject to epileptic seizures at any time.[8] In rejecting a defense of lack of consciousness at the time of the killings, the Court stated:

> "To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable

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[7]The brief of Amicus National Counsel on Alcoholism urging invalidating public intoxication statutes as applied to all persons has the merit of candour, but its suggested nullification of statutes reaching the "status of human inadequacy" would seem to void all crime.

[8]*People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799 (1956).

for culpable negligence, as the courts below have properly held. [citations omitted] To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation . . .'"[10]

The Court of Appeals in *Driver* seems to have adopted an opposing view, without analysis of the problem, and furthermore to have written its new defense into the Constitution.

In *Easter v. District of Columbia*, 361 F.2d 50 (C.A.D.C. 1966), eight judges sitting en banc held as a matter of statutory construction, that the District of Columbia prohibition against public intoxication had been modified by Congress in 1947[11] to exclude from penal liability a person who "habitually uses alcoholic beverages to the extent that he has lost the power of self-control." The Court did not state whether this last phrase refers to lack of power to abstain, lack of power to drink moderately, or both. As a question of statutory construction, the Texas Court's decision in the case at bar is to the contrary, of course, and is binding on this Court as a construction of state law."[12] However, four of the eight judges in *Easter* went further and by dictum stated that their decision would be the same under the Eighth Amendment. They quoted the language of *Driver*, supra, verbatim and did not seek to further the analysis of the problem.

A number of states have considered the question of whether addiction to narcotics is a defense under *Robinson* to crimes proscribing conduct related to the ad-

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[10] *Id.* at 804.
[11] 61 Stat. 744 C.472, now D.C. Code Sections 24-50 1 et seq.
[12] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

diction. This contention has been rejected by the United States Court of Appeals for the District of Columbia,[45] and by the highest courts of the states of California,[46] Illinois,[47] Louisiana,[48] New Jersey,[49] and Wisconsin.[50] *A fortiori,* these decisions ought to be applicable to the case at bar.

6. *The alternatives to penal treatment of alcoholics are involuntary civil commitment or allowing them, if they choose, to remain on the streets. The former raises substantial libertarian dangers. The latter creates added risks to the health and lives of alcoholics and furthers the sense of frustration in those observing this untouchable class.*

Following the decision in *Robinson v. California*[51] the states of New York and California enacted statutes for civil commitment of narcotic addicts for treatment. These acts permit indefinite incarceration if successful treatment is not achieved.[52] Stimulus to similar

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[45] *Lloyd v. United States,* 343 F.2d 243 (1964) (possession of narcotics by addict in violation of Harrison Act. *Robinson* held inapplicable.)

[46] *In re Carlson,* 48 Cal.Rptr. 875, 410 P.2d 379 (1966) (penal prohibition against use of narcotics by addict unaffected by *Robinson*); *People v. O'Neil,* 44 Cal.Rptr. 320, 401 P.2d 928 (1965) (driving a motor vehicle while addicted to narcotics, *Robinson* held inapplicable.)

[47] *People v. Nettles,* 34 Ill.2d 52, 213 N.E.2d 536 (1966) (possession of narcotics by addict, *Robinson* held inapplicable.)

[48] *Blouin v. Walker,* 244 La. 699, 154 So.2d 368 (1963) (use of narcotics by addicts; *Robinson* held inapplicable.)

[49] *State v. Margo,* 40 N.J. 188, 191 A.2d 43 (1963) (being under the influence of narcotics, *Robinson* held inapplicable).

[50] *Browne v. State,* 24 Wis.2d 491, 129 N.W.2d 175 (1964) (use of narcotics by addict, *Robinson* held inapplicable.)

[51] 370 U.S. 660 (1962).

[52] See Note, *Civil Commitment of Narcotics Addicts,* 76 Yale L.J. 1160 (1967).

activity might be involved in a reversal of the case at bar. Loss of liberty would then take the form of preventive detention for the compulsory "treatment" of alcoholics for their own benefit, as paternalistically conceived, and to keep them from the public view. Theoretically such treatment might continue until—and unless—the patient was pronounced recovered. From a treatment standpoint, delinquent public behavior would be irrelevant, as would be the amount of social harm which a patient had caused.

The most likely subjects for civil commitment would presumably be the skid row alcoholics who constitute so substantial a portion of those presently arrested.[11] There is reason to believe that these persons present the poorest prognosis. A recent report states that on the basis of limited information available, it is likely that less than 10 or 12 percent of this group "can obtain *aid* from ordinary therapy."[12] There is a wide range of therapies in use: emetic drugs given along with alcohol to produce nausea and vomiting and hence hopefully to condition aversion, tranquilizing drugs, disulfiram ("Antabuse") to produce flushing, extreme unease, nausea, and vomiting in the event of ingestion of alcohol, and psychotherapy are among those utilized.[13] Institutional facilities and trained staffs to accommodate the huge numbers of alcoholics who would be subject to being rounded up for treatment are

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[11] See *Report of the President's Commission on Law Enforcement and Administration of Justice* (1967) 233-235.

[12] U.S. Department of H.E.W., Public Health Service, *Alcohol and Alcoholism* (1967) 37, (emphasis supplied).

[13] See Id. at 33; treatments less commonly used today include electric shock, spinal drainage to reduce intracranial pressure, insulin coma. Chafetz and Demone, *Alcoholism and Society* (1962) 213.

largely nonexistent." And should facilities be constructed, the level of staffing and care in public mental hospitals in the United States does not provide much encouragement that institutions for care of alcoholics would be effective ones.

A recent report states:

> "Although treatment for problem drinkers is essential, it is not in itself prevention; treatment efforts probably cannot even cope with new cases as they arise: problem drinkers are so numerous that treatment for all would require the efforts of most of the professionally trained physicians, psychiatrists, social workers, nurses, and psychologists in the country. And there is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States.'"[11]

In view of libertarian values involved and the poor prognosis for successful treatment, doubts have been expressed with respect to the desirability and even the constitutionality of civil commitment.[12] Mr. Peter Barton Hutt, counsel in the present case for Amici A.C.L.U. et al., has been quoted as stating to the

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[10] See *Report by the President's Commission on Law Enforcement and Administration of Justice* (1967) 235.

[11] Cooperative Commission on Study of Alcoholism, *Alcohol Problems* (1967) 120 (emphasis original).

[12] See *Report of the President's Commission on Crime in the District of Columbia* (1966) 499.

1966 annual meeting of the National Council on Alcoholism:

> "I have grave doubts . . . . about the constitutionality of wholesale civil commitment of chronic alcoholics. We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration [. . . I would caution those who might rush headlong to adopt civil commitment procedures and remind them that just as difficult legal problems exist there as with the ordinary jail sentence.'"[7]

The New York Civil Liberties Union has filed an action to invalidate the New York statutes for civil treatment of narcotics addicts urging similar grounds.[8] If civil treatment is lacking in facilities or in means to compel cooperation of the alcoholic, the "revolving door" may turn even more rapidly. The experience of Washington, D. C., after the *Easter* decision may be expected to be repeated across the land, if *Robinson* is extended to public drunkenness:

> "A deadly drama is played daily in front of the District's Alcoholic Rehabilitation Clinic.
>
> "Its dazed, glassy-eyed participants lurch off Health Department busses and stumble toward the clinic. Most never get there.
>
> "Some, their shoulders hunched deep into tattered jackets, walk past the old red-brick building

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[7] Quoted in Robitscher, *Psychiatry and Changing Concept of Criminal Responsibility*, 31 Federal Probation 49 (1967).
[8] See New York Times, Nov. 14, 1967, p. 39, col. 2.

at 14th and Q streets, N.W. Others stagger up the two flights of stairs to the clinic, peer into the gloomy waiting room, and then shuffle back down the stairs.

"In one day last week, 200 of these court-adjudged chronic alcoholics were transported to the clinic. Only 28 registered for treatment.

"Confronted with inadequate long-term treatment facilities, many will never awaken from their blurred nightmare world. They will freeze to death on the District's streets this winter or be killed in desperate struggles with other drunks for food, liquor and clothing.

"This bleak picture was painted by Dr. Sanford L. Billet, chief of the Clinic. . . .

* * *

"Moreover, Billet said, the clinic's handling of derelict alcoholics is 'set up to fail.' He explained.

" 'It is difficult to enter into a meaningful relationship with a skid-row alcoholic. The patient must have some purpose consonant with the doctor's purpose. There must be some agreement on goals, a common meeting ground.

"Billet said that 'therapeutic contact' had been established with less than 10 per cent of the skid row alcoholics who have trudged into the center since the federal court ruling. Of these, he said, only a tiny percentage has been helped.'"[1]

Appellant does not view criminal proscription of public intoxication by chronic inebriates with satisfaction. It earnestly hopes that experimentation with different programs by legislators, administrators,

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[1] The Washington D.C. Evening Star, October 26, 1966, p. 1, col. 1.

courts, and private agencies develop satisfying alternatives. But it urges that the response of our society to the enormously complex problems associated with this case not be controlled by constitutional adjudication.

CONCLUSION

For the reasons stated, appellant urges that the judgment of the court below be affirmed.

Respectfully submitted,

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Attorney General of Texas

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief for Appellee were served on the attorney for the Appellant by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of January, 1968, addressed as follows: Mr. Don L. Davis, Byrd, Davis, Eisenberg & Clark, Attorneys at Law, 214 Austin National Bank Building, Austin, Texas 78701.

GEORGE M. COWDEN
First Assistant Attorney General

DEC 18 1967

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SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1967

No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
No. 1 OF TRAVIS COUNTY, TEXAS

MOTION OF NATIONAL COUNCIL ON ALCOHOLISM FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1967

No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
NO. 1 OF TRAVIS COUNTY, TEXAS

MOTION OF NATIONAL COUNCIL ON ALCOHOLISM FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

National Council on Alcoholism hereby respectfully moves for leave to file a brief as *Amicus Curiae* in the above-entitled case. Counsel for Appellant have consented to the filing of the attached brief. The consent of Counsel for Appellee was requested but refused.

The interests of *Amicus* and its reasons for requesting leave to file a brief are set out at pages 3-4 of the attached brief.

Respectfully submitted,

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50 Broad Street,
New York, New York 10004,
Attorney for Amicus Curiae.

December 15, 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 405

LEROY POWELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE COUNTY COURT AT LAW
No. 1 OF TRAVIS COUNTY, TEXAS

BRIEF OF NATIONAL COUNCIL ON ALCOHOLISM AS *AMICUS CURIAE*

Question Presented

Whether Article 477 of the Texas Penal Code violates the Fourteenth Amendment to the United States Constitution.

Interests of *Amicus Curiae*

This case presents the question of the validity of the penal approach to the problem of skid row derelicts.

The Appellant argues that Article 477 of the Texas Penal Code is in violation of the Constitution of the United States. His argument and the rationale of recent decisions [1]

[1] *Driver* v. *Hinnant*, 356 F. 2d 761 (4th Cir. 1966) and *Easter* v. *District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966).

on which the argument is based is predicated on the fact that such legislation is a violation of the Eighth and Fourteenth Amendments to the United States Constitution as applied to alcoholics.

The National Council on Alcoholism is of the opinion that the Texas statute is fundamentally invalid and in violation of the Fourteenth Amendment to the Constitution *as applied to all individuals* because public intoxication arrests are status arrests and, as such, invalid under the Fourteenth Amendment. It is believed that, if the rationale of Appellant is adopted as the basis for reversal, the already confused law as to intoxication as a defense to a criminal prosecution will be further confused. It is believed desirable to have a different rationale, that urged by the National Council on Alcoholism, presented to the Court for consideration in the disposition of this case.

The National Council on Alcoholism, organized in 1944, is a national association concerned with the problem of alcoholism. The National Council on Alcoholism has over eighty affiliates throughout the United States that disseminate information regarding alcoholism and direct those afflicted with the disease to treatment. Because of its interest in the problem of alcoholism, it is concerned with the defense of intoxication and the law's approach to the problem of intoxication.

Summary of Argument

While drunkenness may be the occasion for a public intoxication arrest, human inadequacy is the gravamen of the offense. Fundamentally, public intoxication arrests are not arrests for drunkenness or intoxication. They are status arrests. The punishment of the harmless and unfortunate derelict because of his condition is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Argument

Amicus urges the reversal of the conviction of Appellant. It prefers, however, to see this result attained on a more fundamental rationale than that urged by Appellant and that advanced by the courts in the *Driver* and *Easter* cases.

The reasons for the position of *Amicus* are set forth convincingly and in detail by Mr. Justice John M. Murtagh of the Supreme Court of the State of New York in two recent law review articles.[2]

Traditionally, proof of an *actus reus* and *mens rea* are essential to a criminal conviction. The rationale of the opinions in the *Driver* and *Easter* cases presupposes that a public intoxication statute is directed at an *actus reus* and a *mens rea*. The opinions then proceed to broaden the defense of intoxication by saying that in the case of a chronic alcoholic there is no volition and, hence, no *actus reus*.

This rationale overlooks the fact that the gravamen of a public intoxication statute is neither an *actus reus* nor a *mens rea* but rather a status, the status of human inadequacy.[3]

Public intoxication statutes providing for status arrests violate the Fourteenth Amendment to the United States Constitution.[4] *This is true whether the person arrested is a chronic alcoholic or not.*

The traditional defense of intoxication in criminal cases is confused and difficult to support as a matter of abstract logic.[5] The rationale of the *Driver* and *Easter* cases by broadening the defense as to public intoxication arrests in

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[2] Murtagh, 35 Fordham L. Rev. 1 (1966); Murtagh, 36 Fordham L. Rev. 51 (1967).

[3] *Fenster* v. *Leary*, 20 N.Y. 2d 309 (1967); Murtagh, 36 Fordham L. Rev. 51, 58 (1967).

[4] See *Robinson* v. *California*, 370 U.S. 660, 677-78 (1962) (Douglas, J. concurring); Murtagh, 36 Fordham L. Rev. 51 (1967).

[5] Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944).

the case of chronic alcoholics adds further confusion to an already confused doctrine.

Also, from a pragmatic standpoint, the *Driver* and *Easter* cases are not contributing to a solution of the important problem of the skid row derelict. In February of this year the President's Commission on Law Enforcement and Administration of Justice issued a report entitled The Challenge of Crime in a Free Society.[6] This report noted that, although one-third of the arrests and convictions in America each year are for public intoxication, "almost everyone in the criminal justice system and out of it has recognized that the criminal process is an irrational means of dealing with drunks."[7] Following the *Easter* decision, there was a sharp increase in arrests for public intoxication in the District of Columbia.[8] In contrast, in New York City the Police, at the instance of the judiciary, have abandoned all such arrests.[9] Traditionally, such arrests had amounted to 30,000 annually in New York City.[10]

CONCLUSION

For the reasons stated above *Amicus* urges that the judgment of the court below be reversed on the ground that the arrest was a status arrest and, as such, in violation of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

PAUL O'DWYER,
50 Broad Street,
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Attorney for Amicus Curiae.

---

[6] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967).

[7] *Id.* at 14.

[8] Chapter 7, Section 1, Report of the President's Commission on Crime in the District of Columbia.

[9] Murtagh, 36 Fordham L. Rev. 51, 56 (1967).

[10] Murtagh, 35 Fordham L. Rev. 1, 5 (1966) footnote 33.

SUPREME COURT, U. S.

FEB 28 1968

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

REPLY BRIEF FOR APPELLANT

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March, 1968

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

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THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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REPLY BRIEF FOR APPELLANT

The Texas Attorney General's very candid brief[1] readily frames the points at issue in this case. First, he contends that Appellant's public intoxication was the result of his deliberate and free choice and not the involuntary product of his disease. Second, he believes that criminal punishment of derelict alcoholics for their public intoxication serves both deterrent and re-

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[1]The Texas Attorney General's brief does not represent the views of the entire government of the State of Texas. The Texas Commission on Alcoholism has entered an appearance in this case as amicus curiae in support of Appellant.

habilitative purposes, and therefore should be continued. It is thus clear that, if this Court does not reverse the lower court's judgment, Appellant and thousands of other alcoholics throughout the country will remain in the revolving door between skid row and the local workhouse for the rest of their lives.

Appellee raises six arguments, none of which are tenable, in an effort to perpetuate the injustice evidenced by this appeal. Properly analyzed, these specious contentions are readily unveiled as being without support in either logic or authority.

1. THE TRIAL COURT'S FINDINGS OF FACT.

Appellant does not dispute that, where justice requires it, this Court may set aside the Findings of Fact of a lower court. In this case, however, the Texas Attorney General's position is unique. He may be the first *appellee* in this Court who was compelled to ask that the lower court's Findings of Fact be disregarded in order that its judgment may be upheld. Indeed, he appears to concede that, unless those Findings of Fact are ignored, he cannot prevail.

The Brief for Appellant and the Brief for Amici Curiae set out in abundant detail references to the record evidence and to unimpeachable medical, scientific, correctional, religious, and lay authorities supporting the lower court's Findings of Fact. These authorities establish that an alcoholic drinks involuntarily as a result of a poorly-understood but unmistakable disease. Three United States Courts of Appeals have held without dissent, in the *Driver*,[1] *Easter*,[2] and

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[1] *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

[2] *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) *(en banc)*.

Sweeney[1] cases, that alcoholism is a disease that deprives its victims of the ability to control their drinking.

To balance the overwhelming weight of expert opinion, Appellee offers a distorted reading of one portion of Dr. Wade's testimony taken out of context, together with a short quotation from a leading medical text that, standing alone, supports Appellant's contentions and, if read in context, unquestionably requires reversal of the lower court's opinion.

Dr. Wade testified that, when sober, Appellant (like any alcoholic) understands that he is taking a drink. His act of raising a glass or bottle to his lips is voluntary, in that there is no insanity or physical compulsion involved. But at the same time, the alcoholic is under both a "compulsion" or "exceedingly strong influence" to drink, and the illusion that he will be able to control his drinking and will not become intoxicated. As Dr. Wade testified under cross-examination:

> "It has been my experience that each alcoholic wakes up on the world from each drunk with the full feeling and resolution in his heart that he is going to be able to drink from now on, and they seem to believe that this time is going to be different, that they are going to have this one or two drinks, and they are going to quit this time." (A. 22)

Jellinek similarly recognized the alcoholic's inability to appreciate the nature and consequences of the first drink.[2]

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[1] *Sweeney v. United States*, 353 F.2d 10 (7th Cir 1965).

[2] Jellinek, *The Disease Concept of Alcoholism* 42 (1960).

The "compulsion" or "exceedingly strong influence" to take the first drink, to which Dr. Wade refers (A. 24, 26), is well recognized by the medical profession. The World Health Organization has stated that "compulsive craving and dependence can develop in those individuals whose make-up leads them to seek and find an escape in alcohol.'" An alcoholic's resumption of drinking after a period of abstinance results from "the building up of physiological tension which provokes a 'pathological desire' for alcohol as a means of relieving this tension," or from "a physiopathological condition.'" Jellinek observes the same "accumulation of tension,'" and throughout this book describes the alcoholic's inevitable return to drinking as an "inability to abstain.'" The Texas Commission on Alcoholism has characterized this inability to abstain as "an overwhelming compulsion to drink alcohol'"[10]—virtually the same language as Dr. Wade's.[11]

Very few alcoholics are continuously intoxicated. The fact that Appellant, like other alcoholics, is able to remain sober for periods of time before reverting to drunkenness in no way weakens a diagnosis of alcoholism.[12]

Appellee's argument comes down to this—Appel-

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[7]WHO Committee on Alcohol, *First Report,* Tech. Rep. Ser. No. 84, at 11 (March 1954).

[8]WHO Expert Committee on Alcohol and Alcoholism, *Report,* Tech. Rep. Ser. No. 94, at 6 (June 1955).

[9]Jellinek, *The Disease Concept of Alcoholism* 141 (1960).

[10]*Id.* at 35-45.

[10]Texas Commission on Alcoholism, Law Enforcement *Handbook on Alcohol Problems* 13 (undated).

[11]A. 18-20, 23-24, 26-27.

[12]See, e.g., Jellinek, *The Disease Concept of Alcoholism* 35-45 (1960).

lant has freely chosen his life as a destitute inebriate. Appellee has seized upon a short passage from Dr. Wade's testimony in a vain attempt to establish some medical basis for this position, and chooses to ignore the fact that the American Medical Association and the Texas Commission on Alcoholism have flatly contradicted his contentions. His brief cites no other authority for the contention that alcoholics drink voluntarily. It is thus apparent that the Findings of Fact of the court below must stand.

2. THE "DISEASE" OF ALCOHOLISM.

Appellee argues that because "disease" is a vague term, persons afflicted with disease—or at least with mental disease and alcoholism—may properly be punished under the criminal law. This is an obvious attack upon this Court's decision in *Robinson v. California,* 370 U.S. 660 (1962), which rested on the finding that narcotic addiction is now recognized as a disease.

The same vagueness that is ascribed to "alcoholism" and "disease" is inherent in the term "insanity." Treatment of insanity is equally difficult, and the diagnosis and legal determination of insanity is probably even more difficult than for alcoholism. And there are many more mentally ill persons in this country than there are alcoholics. Does this justify refusal to recognize any form of insanity as a defense to a criminal charge? Can an admittedly insane person constitutionally be convicted for conduct that was unquestionably caused by his insanity, or be required to stand trial or be executed while insane, simply because of uncertainty about the diagnosis and etiology of this disease?

This Court has already answered these questions. The same rationale is equally applicable to alcoholism.

3. MAN'S FREEDOM OF WILL.

Appellant agrees that it is unnecessary to take a stand on philosophical questions. The question in this case, however, is not a philosophical one. It is the practical question whether involuntary behavior—an alcoholic's public intoxication—can be made a criminal offense. At issue is whether Appellant, and others like him, will spend their lives in jail merely for exhibiting the symptom of their illness in public.

On page 16 of his brief, Appellee again argues that:

> "There was a subjective consciousness of freedom to choose each time appellant began to drink, knowing that his past experience had been that he would continue to ingest alcohol to the point of public drunkenness."

This directly conflicts with Dr. Wade's testimony, and is unsupported by record evidence or medical authority.

Appellee's citation of Glanville Williams at page 14 of his brief is equally unpersuasive. Professor Williams was there discussing *voluntary* drunkenness, not the involuntary drunkenness of an alcoholic. In a later chapter he fully recognizes the difference between voluntary drinking and alcoholism:

> "Still another situation for which a sound penal theory should provide is where the offender is an alcohol addict. He may have become predisposed to this through some injury or he may be congenitally prone. In either event it is unrealistic to say that on the occasion in question the getting

drunk was his voluntary act, in the sense that it was something he could have avoided." Williams, *Criminal Law:* The General Part § 181, at 567 (2d ed. 1961).

Appellee's attempt to justify criminal detention of chronic inebriates as humane and productive contradicts not only the very authorities cited for support, but every other major study of this problem. The President's Commission on Law Enforcement and Administration of Justice, and Pittman and Gordon, cited at page 17, both expressed outrage at the use of criminal sanctions to handle chronic inebriates.[13] More recently, Professor Kadish has stated that "no single experience so drastically exemplifies the misuse of the criminal law."[14]

The substance of Appellee's position is that criminal incarceration of sick people is justified because these sick people are handled humanely in jail. Assuming arguendo that they are treated humanely—a proposition flatly rejected by both the U.S. and D.C. Crime Commissions[15]—would this mean that any sick person may be jailed for his illness as long as he is treated decently? Could he be locked up on the pretext that, as Appellee's brief states at page 15, he will be "given food, clothing, shelter, and a period of compulsory

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[13] *Report by the President's Commission on Law Enforcement and Administration of Justice* 233-237 (1967); Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriates* 1, 42, 139, 142 (1958).

[14] Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 157, 166 (November 1967).

[15] The D.C. Crime Commission found, for example, that 16 persons arrested for intoxication died while in police custody in 1964-1965. *Report of the President's Commission on Crime in the District of Columbia* 476 (1966).

continence?" No one questions that a State may provide proper treatment for sick people, but no one has ever seriously suggested that this may constitutionally be done through the criminal process.

The U.S. and D.C. Crime Commissions, and the Cooperative Commission on the Study of Alcoholism, have all rejected criminal sanctions as ineffective either to deter drunkenness or to rehabilitate alcoholics.[11] The World Health Organization's most recent report on alcoholism adds yet another voice to this unanimous view:

> "Punishment of the drunken offender does not prevent the person dependent on alcohol from repeating over and over again his self-destructive, almost suicidal behavior, which often seems designed to invite punishment. The fining and imprisonment of these and other drug-dependent persons does not prevent recidivism if other measures are not taken as well." WHO Expert Committee on Mental Health, *Services for the Prevention and Treatment of Dependence on Alcohol and Other Drugs,* Tech. Rep. Ser. No. 363, at 21 (1967).

Appellee rejects these impressive authorities without a single citation to opposing authority.[12]

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[11] See Brief for Amici Curiae ACLU et al. at 33-35, 53-55.

[12] The North American Judges Association, which has joined in submitting an amicus brief in this case, considers this problem of such importance that it conducted a special survey of its members to provide an up-to-date estimate of the impact of alcoholism upon the nation's lower courts. 194 American courts, having jurisdiction over 12% of the country's population, reported over 750,000 arrests for simple drunkenness under various types of statutes and ordinances during the past calendar or fiscal year, an average of about 3,900 arrests per reporting court. Some courts reported only arrests that resulted in a court appearance. Many reporting

Following the time honored tradition, Appellee attempts to play the alarmist by suggesting some correlation between alcoholism and crime.[14] No one questions that a large number of offenders have consumed alcoholic beverages before committing a crime. There is absolutely no evidence, however, that *alcoholics* become drunk and then, because their inhibitions are released, commit serious crimes.[15] None of the authorities cited by the Texas Attorney General remotely suggests such a pattern.

4. *Durham v. United States*

Appellant has never argued that the *Durham* rule[16] should be applied across the nation. *Durham* involved mental illness, and the instant case does not. Alcohol-

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courts did not maintain information on repeat offenders. Those who did—137 out of 194—reported that 250,000 of a total of 550,000 arrests, or 46% of the arrests they reported, involved persons arrested for drunkenness two or more times during the year. Repeat offenders averaged 5.3 arrests during the period. Communication from Judge James A. Maloney, Albuquerque, New Mexico, N.A.J.A. Board Member. The U.S. Crime Commission estimated, from incomplete data, that at least 2,000,000 arrests in 1965 were for intoxication. *Report of the President's Commission on Law Enforcement and Administration of Justice*, 233 (1967). The N.A.J.A. survey, based on more recent and more reliable data, suggests there may be as many as 6,250,000 such arrests each year in the entire country.

[14] Appellee's argument that recognition of alcoholism as a defense to a charge of public intoxication will open the floodgates of crime has already been disposed of at pages 56-57 of the brief for Amici Curiae.

[15] See, e.g., Pittman, *Public Intoxication and the Alcoholic Offender in American Society*, in The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness*, App. A, at 14: "there are as yet no data that demonstrate that alcoholism is a significant factor in the commission of crimes."

[16] *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

ism is not a form of insanity and Appellant has never suggested that it is.

Appellee prefers the ALI formulation of "insanity"[11] that has now been adopted in several jurisdictions, to the *Durham* formulation as modified by McDonald.[12] To the extent that any formulation of the insanity defense is relevant to this case, the broad "mental disease or defect" concept underlying the ALI rule is clearly the approach that should be applied to the analogous, but nevertheless separate, problem of alcoholism. Section 4.01 of the Model Penal Code provides a defense where the individual "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." An alcoholic's intoxication squarely fits this defense, except that his lack of capacity is the result of alcoholism rather than of a mental disease or defect.

5. *Robinson v. California*

In arguing that *Robinson* should be limited to its facts, Appellee sets up a distinction between a "status crime" and an "action crime." He is, however, unable to offer a *rationale* for this distinction. Nowhere is it explained why it is less cruel to punish a symptom of a disease than to punish the disease itself.

Appellee fails to distinguish the *Easter* and *Driver* decisions from the instant case. As the testimony in those cases showed, both Mr. Easter and Mr. Driver periodically abstained from drinking. Thus, Appel-

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[11] ALI Penal Code, Proposed Official Draft, § 4.01 (May 1962).

[12] *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1957).

lant's occasional sobriety hardly differentiates him either from Mr. Easter and Mr. Driver or from any other chronic alcoholic. In Texas, as well as North Carolina and the District of Columbia, alcoholism is defined by statute as loss of the power of self-control over the use of alcoholic beverages. In short, Appellee simply disagrees with *Easter* and *Driver*—and, presumably, also with *Sweeney* and the other cases that hold that an alcoholic drinks involuntarily.

6. APPELLEE'S ALTERNATIVE TO CRIMINAL PUNISHMENT.

Finally, Appellee suggests that penal incarceration is preferable to less humane civil commitment, and therefore is justifiable on that basis. The short and obvious answer to this contention is that a State is no more justified in using civil commitment to punish alcoholics than it is in employing criminal procedures for this purpose. Is Appellee suggesting that if this Court reverses the lower court's decision the State of Texas will devise alternative means to punish alcoholics?

Appellee rejects, without discussion, the solution recommended by the U.S. and D.C. Crime Commissions—voluntary treatment. The FBI Law Enforcement Bulletin for December 1967 contains an article by the St. Louis Chief of Police describing that city's new detoxification center—the first innovation in handling public inebriates in over 100 years. The center has resulted in a 57% reduction in the time police officers must spend in handling intoxicated persons, a 60% reduction in drunkenness arrests, and a 97% voluntary response by the inebriates who have utilized

it. This response to a facility that it admittedly only one component of a comprehensive program, which must eventually also provide inpatient and outpatient treatment, provides tremendous hope for the future, and validates the U.S. and D.C. Crime Commissions' recommendations.

The World Health Organizations has just stated that:

> "The treatment of persons dependent on alcohol, with the best methods available, has produced encouraging results. Marked improvement or social recovery has been reported in up to 50-70% of cases, depending mainly on the underlying personality of the person treated. The proportion of therapeutic failures is generally higher among abusers of other drugs. . ..." WHO Expert Committee on Mental Health, *Services for the Prevention and Treatment of Dependence on Alcohol and Other Drugs,* Tech. Rep. Ser. No. 363, at 24 (1967).

The pessimism—and vindictiveness—expressed by the Texas Attorney General regarding alcoholics finds no support among the professional organizations interested in handling this problem on a new, humane, and effective basis.

On December 21, 1967, the Supreme Court of the State of Washington ruled, over three dissents, that alcoholism is not a defense to drunkenness. *Seattle v. Hill,* 435 P.2d 692 (1967). The majority of five judges (two of whom concurred only in the result) concluded that, since 90% of all alcoholics are not *convicted* of public drunkenness, every alcoholic has "the power to make a choice." They relied upon the hornbook rule that "Drunkenness is not to be regarded as involuntary * * * merely because it is the result of an inordi-

nate and irresistible appetite for drink, overcoming the will and amounting to a disease"—the old *Potts*[10] rule—in holding that the Seattle drunkenness ordinance is "applicable to chronic addictive alcoholics." 435 P.2d at 698, 699, 700, 703. One of the two judges who concurred only in the result felt constrained to point out that he agreed "with much that is said in the dissent, particularly with that portion which points out that the criminal-law approach to chronic addictive alcoholism, as manifested by public drunkenness, is a total and costly failure." 435 P.2d at 703.

The three dissenting judges accepted the rationale of *Easter* and *Driver,* namely, that an alcoholic may not constitutionally be convicted for the involuntary product of his illness. They emphasized that the majority's conclusion that an alcoholic is not sick but merely weak-willed, is inconsistent with the uncontradicted record evidence and contrary to all medical authority. In their view, an alcoholic's appearance in public when intoxicated is as inevitable and as involuntary as his drunkenness. The fact that only indigent or derelict alcoholics are convicted for public drunkenness hardly demonstrates that all alcoholics are able to control either their drinking or their appearance in public while intoxicated. 435 P.2d at 704-707, 709-710.

The approach of the majority in *Hill,* which adopts the *Potts* rule, is identical to that of the D.C. Court of Appeals in the *Easter* case,[11] which was subsequently reversed by a unanimous U.S. Court of Appeals sitting *en banc,* and to Appellee's argument in the instant

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[10] *State v. Potts,* 100 N.C. 457, 6 S.E. 657 (1888).

[11] *Easter v. District of Columbia,* 209 A.2d 625 (D.C. Ct. App. 1965), rev'd, 361 F.2d 50 (D.C. Cir. 1966) *(en banc).*

case. The fallacies of this approach have been documented by the dissent in *Hill,* by the *Easter, Driver,* and *Sweeney* opinions, by the U.S. and D.C. Crime Commissions, and by the other authorities cited in the briefs previously filed in this case in support of Appellant.

CONCLUSION

Appellant therefore requests that the decision of the lower court be reversed.

Respectfully submitted,
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By ----------
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March, 1968

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief for Appellant were served on the Honorable Crawford Martin, Attorney General for the State of Texas, on this ____ day of March, 1968, by delivery in person to his office located at the Supreme Court Building, Capitol Station, Austin, Texas.

TOM H. DAVIS

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NO. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

SUPPLEMENTAL BRIEF FOR APPELLEE

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assessing responsibility in criminal cases. Since these classifications were familiar, however, many phychiatrists understandably used them in court despite their unsuitability. And some psychiatrists, perhaps unwittingly, permitted their own notions about blame to determine whether the term mental illness should be limited to psychoses, should include serious behavior disorders, or should include virtually all mental abnormalities.'"

* * * *

"[T]estimony in terms of 'mental disease or defect' seems to leave the psychiatrist too free to testify according to his judgment about the defendant's criminal responsibility."[10]

"An alternative to *Durham-McDonald*[11] would be to make the ultimate test whether or not it is just to blame the defendant for his act. If the question were simply whether it is 'just' to 'blame' the defendant, then mental illness, productivity, ability to control oneself, etc., might be factors which the jury could consider in reaching its conclusion on the justness of punishment. Since the words 'just' and 'blame' do not lend themselves to refined definition, the charge to the jury under this test probably would not be detailed. But the words that have been used in other charges, such as 'defect of reason,' 'disease of the mind,' 'nature and quality of the act,' 'behavior controls,' 'mental disease or defect,' 'capacity . . . to appreciate the

---

[9]Text of opinion accompanying footnote 7-9. (citations omitted)

[10]Text of opinion accompanying footnote 26.

[11]*McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) defined "mental disease or defect" as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." See our brief in chief at 20.

criminality of his conduct,' and 'capacity to conform his conduct to the requirements of law,' are also vague—the chief difference being that these words give a false impression of scientific exactness, an impression which may lead the jury to ignore its own moral judgment and defer to the moral judgment of scientific 'experts.' However, we are unaware of any test for criminal responsibility which does not focus on the term 'mental illness,' or some closely similar term. This focus may be unfortunate, but we are not deciding that question now, and are not proposing to abandon the term.'"[11]

In a footnote written on behalf of himself Chief Judge Bazelon indicated that his Court might eventually consider itself forced to eliminate the insanity defense entirely or change it as to make it less related to the medical model."[12]

It is extraordinary that while the Court of Appeals is expressing such root doubts of the meaningfulness and wisdom of its attempt to relate criminal responsibility to concepts of "disease" and "behavior control," in spite of more than thirteen years of intensive and continuous judicial effort, the Supreme Court is asked to adopt similar criteria for every jurisdiction in the United States.

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[11]Footnote 23.
[12]Footnote 33.

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SUPPLEMENTAL BRIEF FOR APPELLEE

We have received opinions in two recent cases which were not available to us at the time of the preparation of our brief in chief and which we would like to call to the attention of the Court.

In *City of Seattle v. Hill*[1] the Supreme Court of Washington held that an ordinance prohibiting public drunkenness was valid as applied to a chronic alcoholic. Psychiatric testimony in the case was supplied by a Dr. Pattison, a member of the staff of the University of Washington Medical School, apparently called by the defense:

> "Dr. Edward M. Pattison, eminently qualified specialist in psychiatry and the treatment of alcoholism, while emphasizing the inability of an alcoholic to stop drinking *once he had started,* said that the persons so afflicted typically remained sober for periods of 6 to 8 months voluntarily but eventually returned to their drinking.'"[2]

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[1] ——Wash.2d ——, 435 P.2d 692 (Dec. 21, 1967).

[2] 435 P.2d at 696 (emphasis supplied).

The witness attributed the return to drinking after abstinence to feelings of solace, comfort, escape from loneliness and feelings of shame and guilt.[3]

The Court noted that 90% of alcoholics in King County and Seattle, Washington, are not convicted of public drunkenness. It also observed that medical testimony by an internist indicated that defendant's physical health had benefitted from intermittent periods of confinement in the city jail. The Court concluded that the ordinance bore a rational relationship to acceptable public objectives and, further, did not violate the Eighth and Fourteenth Amendments to the United States Constitution, reaching conduct rather than mere status.[4]

Finally, the Court observed:

> "Obviously, the courts ought not invalidate legislation simply in the hope of compelling better legislation. Suppose this court, as a matter of public policy, were to strike down Seattle's ordinance prohibiting public drunkenness. What, then, are the alternatives? The courts levy no taxes, appropriate no moneys, employ no doctors, nurses, social workers and attendants, operate no hospitals, clinics, detoxification centers, and have no personnel or facilities under their direction for the care and treatment of chronic addictive alcoholics or for the protection of society from their misbehavior. Having created the vacuum, the courts are without means to refill it."[5]

There were two dissenting opinions, which urged the following of *Driver v. Hinant*.[6] The minority justices

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[3] Id.
[4] 435 P.2d at 698.
[5] 435 P.2d at 702.
[6] 356 F.2d 761 (C.A. 4, 1966).

failed to distinguish decisions of alcoholics to return to drinking after periods of abstinence from compulsion to return to drinking. They also relied, without critical analysis, on the assertion that chronic alcoholics were "diseased." The dissents offered no distinction between defendant choosing to drink and appear in public and the decisions of other types of recidivists to yield to motives to commit other kinds of additional crimes.

In the second decision, the United States Court of Appeals for the District of Columbia Circuit implicitly concedes many of the weaknesses of their insanity rule, essentially the constitutional standard urged upon this Court in the present case by appellant.[7] In *Washington v. United States,*[8] Chief Judge Bazelon in writing for the Court stated:

> "In *Durham v. United States,* we announced a new test for insanity: 'An accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.' We intended to widen the range of expert testimony in order to enable the jury 'to consider all the information advanced by relevant scientific disciplines.'
>
> "This purpose was not fully achieved, largely because many people thought *Durham* was only an attempt to identify a clearly defined category of persons—those classified as mentally ill by the medical profession—and excuse them from criminal responsibility. In fact the medical profession has no such clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc. may be inappropriate for

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[7] See our brief in chief at 19-22.

[8] —— F.2d ——, No. 20,232, Dec. 13, 1967.

ERRATUM

In the final two paragraphs of our brief in chief "Appellant" should be "Appellee."

Respectfully submitted,

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FILED

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SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

PETITION FOR REHEARING

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July 1968

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

---

PETITION FOR REHEARING

Appellant prays that the Court grant rehearing of its judgment of June 17, 1968 affirming Appellant's conviction for intoxication in a public place under Texas Penal Code Art. 477 and that the case be re-assigned for oral argument for the reasons set forth below.

ARGUMENT

1. The judgment of the Court was supported by

three opinions, none of which reflected the views of a majority of the Court. It has resulted in widespread confusion throughout the country concerning the liability of chronic alcoholics to prosecution for public intoxication.

Public intoxication is the single most important cause of arrest and incarceration in the country today. The vast majority of persons arrested for public intoxication are indigent alcoholics. Just and efficient law enforcement requires that a clear rule of law be enunciated by the Court. Uncertainty about the meaning of the Court's judgment, and of the four opinions delivered, will hamper both law enforcement and public health approaches to the problem of intoxication and alcoholism until the issue is clearly resolved.

2. Uncertainty and confusion about the meaning and future application of the Court's judgment may prevail for many years unless rehearing is granted. Although public intoxication has for years been the leading cause of arrest and incarceration in this country, this is the first such case ever to be heard by the Court. Derelict alcoholics, who are most often arrested under the drunkenness statutes, are very rarely represented by legal counsel. A court reporter is almost never present. Traditional legal procedures are very seldom applied in these cases. Thus it is extremely difficult to compile the type of record that is necessary for an appeal.

3. Three major points considered important, if not controlling, by the three opinions supporting the judgment of the Court were not the subject of detailed briefing or oral argument by Appellant, because they were not at the time considered to be of major impor-

tance to the issues raised: (a) Appellant's ability to confine his drunkenness to his home; (b) the current status of knowledge about treatment of alcoholism; and (c) the current availability of treatment for alcoholism in this country. Because these points were inadequately briefed and argued, the Court was not apprised of several significant facts that might substantially affect the outcome of the case.

CONCLUSION

For the foregoing reasons Appellant respectfully prays that the Court grant rehearing and reassign the case for oral argument.

Respectfully submitted,
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By ----------
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay.

TOM H. DAVIS

July 1968

PROOF OF SERVICE

I, Tom H. Davis, one of the attorneys for Leroy Powell, Appellant herein, depose and say that on the ____ day of July, 1968, I served a copy of the above and foregoing PETITION FOR REHEARING in the above styled and numbered cause on the State of Texas, Appellee herein, by delivering the same to the receptionist in the offices of Mr. Crawford Martin, Esquire, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas, counsel of record for Appellee.

TOM H. DAVIS

Subscribed and sworn to before me, at Austin, Texas, this ____ day of July, 1968.

Notary Public in and for Travis County, Texas

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1967.

Leroy Powell, Appellant, *v.* State of Texas.	On Appeal From the County Court at Law No. 1 of Travis County, Texas.

[June 17, 1968.]

Mr. Justice Marshall announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Black, and Mr. Justice Harlan join.

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art. 477 (1952), which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," "that his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge in the county court, sitting without a jury, made certain findings of fact, *infra*, at 5, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal

within the Texas judicial system,[1] appellant appealed to this Court; we noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The principal testimony was that of Dr. Davis Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade's qualifications. In the next 12 pages Dr. Wade was examined by appellant's counsel, cross-examined by the State and reexamined by the defense, and those 12 pages contain virtually all the material developed at trial which is relevant to the constitutional issue we face here. Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." He added that in his opinion jailing appellant without medical attention would operate neither to rehabilitate him nor to lessen his desire for alcohol.

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right

[1] Tex. Code Crim. Proc., Art. 4.03 (1966).

and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion, coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right."

"Q. Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

"A. Yes, sir.

"Q. And you didn't want that to happen to you today?

"A. No, sir.

"Q. Not today?

"A. No, sir.

"Q. So you only had one drink today?

"A. Yes, sir."

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. It did nothing to examine or illuminate what Dr. Wade might have meant

by his reference to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence," or to inquire into the question of the proper role of such a "compulsion" in constitutional adjudication. Instead, the State contented itself with a brief argument that appellant had no defense to the charge because he "is legally sane and knows the difference between right and wrong."

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, a defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson* v. *California*, 370 U. S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." *Post*, at 16.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [2] This same author concludes that *"a disease is what the medical profession recognizes as such."* [3] In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or

[2] E. M. Jellinek, The Disease Concept of Alcoholism 11 (1960).

[3] *Id.*, at 12 (emphasis in original).

whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.[4]

Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms.[5] Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol.[6] Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the "disease" called "alcoholism." Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from "alcoholism" as a "disease," because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol.[7] He applies the label "gamma alcoholism" to "that species of alcoholism in which

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[4] See, *e. g.*, Joint Information Serv. of the Am. Psychiatric Assn. & the Nat'l Assn. for Mental Health, The Treatment of Alcoholism—A Study of Programs and Problems 6–8 (1967) (hereafter cited as Treatment of Alcoholism).

[5] Jellinek, *supra*, n. 2, at 35–41.

[6] For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a "drinking problem"—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. A. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, *supra*, n. 2, at 17. See generally *id.*, at 13–32.

[7] Jellinek, *supra*, n. 2, at 40.

(1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . . , (3) withdrawal symptoms and 'craving,' *i. e.*, physical dependence, and (4) loss of control are involved."[8] A "delta" alcoholic, on the other hand, "shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control there is inability to abstain."[9] Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns.[10]

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins.

[8] Jellinek, *supra*, n. 2, at 37.

[9] *Id.*, at 38.

[10] See Block, *supra*, n. 6, at 19–49.

Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain" from drinking in the first place.[11] Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of

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[11] Jellinek, *supra*, n. 2, at 41–42.

withdrawal.[12] There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is reduced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic).[13] Other scholars are equally unhelpful in articulating the nature of a "compulsion."[14]

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the impor-

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[12] *Id.*, at 43.

[13] *Id.*, at 41–44.

Dr. Wade did not clarify matters when he testified at trial that a chronic alcoholic suffers from "the same type of compulsion" as a "compulsive eater."

[14] See, *e. g.*, Block, *supra*, n. 6, at 40, 55, 308; Treatment of Alcoholism 6–8; Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 112–114 (1966).

tation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[15]

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our principal social and public health problems.[16] The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000,[17] and most authorities are inclined to put the figure considerably higher.[18] The problem is compounded by the fact that a very large percentage of the alcoholics in this country are "invisible"—they possess the means to keep their drinking problems secret, and the traditionally uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source.[19] Nor can it be gainsaid that the legislative response to this enormous problem has in general been inadequate.

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. Some individual alcoholics have responded to particular forms of therapy with remissions of their symptomatic

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[15] See *Washington* v. *United States*, 390 F. 2d 444, 446–456 (C. A. D. C. Cir. 1967).

[16] See generally Block, *supra*, n. 6, at 19–30, 43–49.

[17] See Treatment of Alcoholism 11.

[18] Block, *supra*, n. 6, at 43–44; Blum & Braunstein, Mind-altering Drugs and Dangerous Behavior: Alcohol, in President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 29, 30 (1967); Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[19] See Block, *supra*, n. 6, at 74–81; Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

dependence upon the drug. But just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale.[20] Most psychiatrists are apparently of the opinion that alcoholism is far more difficult to treat than other forms of behavioral disorders, and some believe it is impossible to cure by means of psychotherapy; indeed, the medical profession as a whole, and psychiatrists in particular, have been severely criticised for the prevailing reluctance to undertake the treatment of drinking problems.[21] Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country.[22] It would be tragic to return large numbers

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[20] See Treatment of Alcoholism 13–17.

[21] *Id.*, at 18–26.

[22] Encouraging pilot projects do exist. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 50–64, 82–108 (1967). But the President's Commission concluded that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication "is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Socitey 235 (1967). Moreover, even if massive expenditures for physical plants were forthcoming, there is a woeful shortage of trained personnel to man them. One study has concluded that:

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best

of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.[23]

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom." [24]

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estimate available, providing all problem drinkers with a weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States." Cooperative Commission on Study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).

[23] For the inadequate response in the District of Columbia following *Easter* v. *District of Columbia*, 361 F. 2d 50 (C. A. D. C. Cir. 1966), which held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness, see President's Commission on Crime in the District of Columbia, Report 486–490 (1966).

[24] Counsel for *Amici Curiae* ACLU et al., who has been extremely active in the recent spate of litigation dealing with public intoxica-

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

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tion statutes and the chronic inebriate, recently told an annual meeting of the National Council on Alcoholism:

"We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration. . . . I would caution those who would rush headlong to adopt civil commitment procedures and remind them that just as difficult legal problems exist there as with the ordinary jail sentence."

Quoted in Robitscher, Psychiatry and Changing Concept of Criminal Responsibility, 31 Fed. Prob. 49 (1967). Cf. Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revelation of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume they serve to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred. The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. Certainly no effort was made at the trial of this case, beyond a monosyllabic answer to a perfunctory one-line question, to determine the effectiveness of penal sanctions in deterring Leroy Powell in particular or chronic alcoholics in general from drinking at all or from getting drunk in particular places or at particular times.

III.

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947); *Weems* v. *United States*, 217 U. S. 349 (1910).[25]

Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson* v. *California*, 370 U. S. 660 (1962), which involved a state statute making it a crime to "be addicted to the use of narcotics." This Court held there that "a state statute which imprisons a person thus afflicted [with narcotic addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . ." *Id.*, at 667.

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson;* nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public

[25] See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill or a leper . . . ." *Id.*, at 666.

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted on a person for being in a condition he is powerless to change." *Post*, at 14. In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Likewise, as the dissent acknowledges, there is a substantial definitional distinction between a "status," as

in *Robinson*, and a "condition," which is said to be involved in this case. Whatever may be the merits of an attempt to distinguish between behavior and a condition, it is perfectly clear that the crucial element in this case, so far as the dissent is concerned, is whether or not appellant can legally be held responsible for his appearance in public in a state of intoxication. The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a "status" criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily. 370 U. S., at 667, n. 9. That this factor was not determinative in the case is shown by the fact that there was no indication of how Robinson himself had become an addict.

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts the particular individual, and that "it is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." *Post*, at 6, n. 2. That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." [26] Even if we limit our consideration to

[26] Compare *Phelan* v. *Pennsylvania*, 427 Pa. 265, 234 A. 2d 540 (1967), cert. denied, 391 U. S. — (1968).

chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain these aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but "not completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.[27]

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[27] The Court did hold in *Lambert* v. *California*, 355 U. S. 225 (1957), that a person could not be punished for a "crime" of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so. It is not suggested either that *Lambert* established a constitutional doctrine of *mens rea*, see generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, or that

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds.[28] The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* in this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham* v. *United States*, 214 F. 2d 862, 875 (C. A. D. C. Cir. 1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e. g.*, the right-wrong test of *M'Naghten's Case*.[29] The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. See, *e. g.*, *Carter* v. *United States*, 252 F. 2d 608 (C. A. D. C. Cir. 1957); *Blocker* v. *United States*, 274 F. 2d 572 (C. A. D. C. Cir. 1959); *Blocker* v. *United States*, 288 F. 2d 853 (C. A. D. C. Cir. 1961) (*en banc*); *McDonald* v. *United States*, 312 F. 2d 847 (C. A. D. C. Cir. 1962)

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appellant in this case was not fully aware of the prohibited nature of his conduct and of the consequences of taking his first drink.

[28] See generally Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[29] 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

(*en banc*); *Washington* v. *United States*, 390 F. 2d 444 (C. A. D. C. Cir. 1967). But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, are not yet clear either to doctors or to lawyers.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1967.

Leroy Powell, Appellant, v. State of Texas.	On Appeal From the County Court at Law No. 1 of Travis County, Texas.

[June 17, 1968.]

Mr. Justice Black, whom Mr. Justice Harlan joins, concurring.

While I agree that the grounds set forth in Mr. Justice Marshall's opinion are sufficient to require affirmance of the judgment here, I wish to amplify my reasons for concurring.

Those who favor the change now urged upon us rely on their own notions of the wisdom of this Texas law to erect a constitutional barrier, the desirability of which is far from clear. To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.

I.

Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tre-

mendous burden on the police. Then it is argued that there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter. But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their arguments, the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.

Public drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 English statute, 4 Jac. 1, c. 5. It is today made an offense in every State in the Union. The number of police to be assigned to enforcing these laws and the amount of time they should spend in the effort would seem to me a question for each local community. Never, even by the wildest stretch of this Court's judicial review power, could it be thought that a State's criminal law could be struck down because the amount of time spent in enforcing it constituted, in some expert's opinion, a tremendous burden.

Jailing of chronic alcoholics is definitely defended as therapeutic, and the claims of therapeutic value are not insubstantial. As appellees note, the alcoholics are removed from the streets, where in their intoxicated state they may be in physical danger, and are given food, clothing, and shelter until they "sober up" and thus at

least regain their ability to keep from being run over by automobiles in the street. Of course, this treatment may not be "therapeutic" in the sense of curing the underlying causes of their behavior, but it seems probable that the effect of jail on any criminal is seldom "therapeutic" in this sense, and in any case the medical authorities relied on so heavily by appellant themselves stress that no generally effective method of curing alcoholics has yet been discovered.

Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences.

These values served by criminal punishment assume even greater significance in light of the available alternatives for dealing with the problem of alcoholism. Civil commitment facilities may not be any better than the jails they would replace. In addition, compulsory commitment can hardly be considered a less severe penalty from the alcoholic's point of view. The commitment period will presumably be at least as long, and it might in fact be longer since commitment often lasts until the "sick" person is cured. And compulsory commitment would of course carry with it a social stigma little different in practice from that associated with drunkenness when it is labeled a "crime."

Even the medical authorities stress the need for continued experimentation with a variety of approaches. I

cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

II.

I agree with MR. JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense.[1] The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified

[1] If an intoxicated person is actually carried into the street by someone else, "he" does not do the act at all, and of course he is entitled to acquittal. *E. g., Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette* v. *United States*, 342 U. S. 246 (1951), I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." [2]

III.

The rule of constitutional law urged by appellant is not required by *Robinson* v. *California*, 370 U. S. 660 (1962). In that case we held that a person could not be punished for the mere status of being a narcotics

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[2] The need for a cautious and tentative approach has been thoroughly recognized by one of the most active workers for reform in this area, Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit. In a recent decision limiting the scope of psychiatric testimony in insanity defense cases, Judge Bazelon states:

"[I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step." *Washington* v. *United States*, 390 F. 2d 444, 457, n. 33. (C. A. D. C. Cir. 1967) (separate opinion).

addict. We explicitly limited our holding to the situation where no conduct of any kind is involved, stating:

> "We hold that a state criminal law which imprisons a person thus afflicted as a criminal, *even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there,* inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." 370 U. S., at 667. (Emphasis added.)

The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision.

A different question, I admit, is whether our attempt in *Robinson* to limit our holding to pure status crimes, involving no conduct whatever, was a sound one. I believe it was. Although some of our objections to the statute in *Robinson* are equally applicable to statutes that punish conduct "symptomatic" of a disease, any attempt to explain *Robinson* as based solely on the lack of voluntariness encounters a number of logical difficulties.[3] Other problems raised by status crimes are in no way involved when the State attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and

[3] Although we noted in *Robinson*, 370 U. S., at 667, that narcotics addiction apparently is an illness that can be contracted innocently or involuntarily, we barred punishment for addiction even when it could be proved that the defendant had voluntarily become addicted. And we compared addiction to the status of having a common cold, a condition that most people can either avoid or quickly cure when it is important enough for them to do so.

unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.[4] In fact, one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed in the absence of any act at all.[5]

The reasons for this refusal to permit conviction without proof of an act are difficult to spell out, but they are nonetheless perceived and universally expressed in our criminal law. Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. See 4 Blackstone, Commentaries 21. Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal."[6]

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[4] As Glanville Williams puts it, "that crime requires an act is *invariably* true if the proposition be read as meaning that a private thought is not sufficient to found responsibility." Williams, Criminal Law—the General Part 1 (1961). (Emphasis added.) For the requirement of some act as an element of conspiracy and attempt, see *id.*, at 631, 663, 668; Perkins, Criminal Law 482, 531–532 (1957).

[5] Williams, *supra*, n. 4, at 11.

[6] *Id.*, at 2.

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our *Robinson* holding to pure status crimes seems to me entirely proper.

IV.

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.[1]

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many such situations. See *Morisette* v. *United States, supra.* But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E. g., United States* v. *Dotterweich,* 320 U. S. 277 (1943). The crimi-

[1] Perkins, *supra,* n. 4, at 762.

nal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.

But even if we were to limit any holding in this field to "compulsions" that are "symptomatic" of a "disease," in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a norcotics addict could not be punished for "being" in possession of drugs or, for that matter, for "being" guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon*, 343 U. S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.*, at 800–801; *id.*, at 803 (Frankfurter, J., dissenting).

The impact of the holding urged upon us would, of course, be greatest in those States which have until now refused to accept any qualifications to the "right from wrong" test of insanity; apparently at least 30 States fall into this category.[8] But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would

[8] See Model Penal Code § 4.01, at 160 (Tent. Draft No. 4, 1955).

be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine not only what constitutes a "disease," but what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated test of insanity.[9] The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.

V.

Perceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself. When our Nation was created by the Constitution of 1789, many people feared that the 13 straggling, struggling States along the Atlantic comprised too great an area ever to be controlled from one central point. As

[9] *Durham* v. *United States*, 214 F. 2d 862 (C. A. D. C. Cir. 1954). Some of the enormous difficulties encountered by the District of Columbia Circuit in attempting to apply its *Durham* rule are related in H. R. Rep. No. 563, 87th Cong., 1st Sess. (1961). The difficulties and shortcomings of the *Durham* rule have been fully acknowledged by the District of Columbia Circuit itself, and in particular by the author of the *Durham* opinion. See *Washington* v. *United States*, *supra*.

the years went on, however, the Nation crept cautiously westward until it reached the Pacific Ocean and finally the Nation planted its flag on the far-distant Islands of Hawaii and on the frozen peaks of Alaska. During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.

This Court is urged to forget that lesson today. We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness. It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow. I suspect this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Hand, The Bill of Rights 73 (1958).

I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that *Robinson* v. *California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that none of them can safely predict. I join in affirmance of this conviction.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1967.

Leroy Powell, Appellant, v. State of Texas.	On Appeal From the County Court at Law No. 1 of Travis County, Texas.

[June 17, 1968.]

Mr. Justice White, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson* v. *California*, 370 U. S. 660, rehearing denied, 371 U. S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. The statute involved here, which aims at keeping drunks off the street for their own welfare and that of others, is not challenged on the ground that it interferes unconstitutionally with the right to frequent public places. No question is raised about applying this statute to the nonchronic drunk, who has no compulsion to drink, who need not drink to excess, and who could

have arranged to do his drinking in private or, if he began drinking in public, could have removed himself at an appropriate point on the path towards complete inebriation.

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge.[1] The sober chronic alcoholic has no compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox,

[1] The trial court gave no reasons for its conclusion that Powell appeared in public due to "a compulsion symptomatic of the disease of chronic alcoholism." No facts in the record support that conclusion. The trial transcript strongly suggests that the trial judge merely adopted proposed findings put before him by Powell's counsel. The fact that those findings were of no legal relevance in the trial judge's view of the case is very significant for appraising the extent to which they represented a well-considered and well-supported judgment. For all these reasons I do not feel impelled to accept this finding, and certainly would not rest a constitutional adjudication upon it.

who could be convicted for being on the street but not for being ill, or like the epileptic, punishable for driving a car but not for his disease.[2]

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*.[3] Although

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[2] Analysis of this difficult case is not advanced by preoccupation with the label "condition." In *Robinson* the Court dealt with "a statute which makes the 'status' of narcotic addiction a criminal offense . . . . ." 370 U. S., at 666. By precluding criminal conviction for such a "status" the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. Although the same may be said for the "condition" of being a chronic alcoholic, it cannot be said for the mere transitory state of "being drunk in public." "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public, and it is not necessarily a state of any great duration. And, an isolated instance of "being" drunk in public is of relatively slight importance in the life of an individual as compared with the condition of being a chronic alcoholic. If it were necessary to distinguish between "acts" and "conditions" for purposes of the Eighth Amendment, I would adhere to the concept of "condition" implicit in the opinion in *Robinson;* I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public. The proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition."

[3] The opinion of MR. JUSTICE MARSHALL makes clear the limitations of our present knowledge of alcoholism and the disagreements among doctors in their description and analysis of the disease. It is also true that on the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites I deem essential to assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly

many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.[4] Whether or not Powell established that he could

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compelled to drink. I find it unnecessary to attempt on this record to determine whether or not Powell is such an alcoholic, for in my view his attempt to claim the Eighth Amendment fails for other reasons.

[4] A holding that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punished for appearing in public while drunk would be a novel construction of that Amendment, but it would hardly have radical consequences. In the first place, when as here the crime charged was being drunk in a

not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.

Also, the only evidence bearing on Powell's condition at the time of his arrest was the testimony of the arrest-

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public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers. The drinker who was not compelled to drink, on the other hand, although he might be as poorly circumstanced, equally intoxicated, and equally without his physical powers and cognitive faculties, could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements. Perhaps the heavily intoxicated, compulsive alcoholic who could not have arranged to avoid being in public places may not, consistent with the Eighth Amendment, be convicted for being drunk in a public place. However, it does not necessarily follow that it would be unconstitutional to convict him for committing crimes involving much greater risk to society.

Outside the area of alcoholism such a holding would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar conviction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

ing officer that appellant staggered, smelled of alcohol, and was "very drunk." Powell testified that he had no clear recollection of the situation at the time of his arrest. His testimony about his usual c ndition when drunk is no substitute for evidence about his condition at the time of his arrest. Neither in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or where he was. For all we know from this record, Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere.

It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.[5]

Because Powell did not show that his conviction offended the Constitution, I concur in the judgment affirming the Travis County court.

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[5] I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1967.

Leroy Powell, Appellant, v. State of Texas.	On Appeal From the County Court at Law No. 1 of Travis County, Texas.

[June 17, 1968.]

Mr. Justice Fortas, with whom Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart join, dissenting.

Appellant was charged with being found in a state of intoxication in a public place. This is a violation of Article 477 of the Texas Penal Code, which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas. He was found guilty and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. Appellant was defended by counsel who urged that appellant was "afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism." Counsel contended that to penalize appellant for public intoxication would be to inflict upon him cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At the trial in the county court, the arresting officer testified that he had observed appellant in the 2000 block

of Hamilton Street in Austin; that appellant staggered when he walked; that his speech was slurred; and that he smelled strongly of alcohol. He was not loud or boisterous; he did not resist arrest; he was cooperative with the officer.

The defense established that appellant had been convicted of public intoxication approximately 100 times since 1949, primarily in Travis County, Texas. The circumstances were always the same: the "subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." At the end of the proceedings, he would be fined: "down in Bastrop County, it's $25.00 down there and it's $20.00 up here [in Travis County]." Appellant was usually unable to pay the fines imposed for these offenses, and therefore usually has been obliged to work the fines off in jail. The statutory rate for working off such fines in Texas is one day in jail for each $5 of fine unpaid. Texas Code Crim. Proc. Art. 43.09.

Appellant took the stand. He testified that he works at a tavern shining shoes. He makes about $12 a week which he uses to buy wine. He has a family, but he does not contribute to its support. He drinks wine every day. He gets drunk about once a week. When he gets drunk, he usually goes to sleep, "mostly" in public places such as the sidewalk. He does not disturb the peace or interfere with others.

The defense called as a witness Dr. David Wade, a Fellow of the American Medical Association and a former President of the Texas Medical Association. Dr. Wade is a qualified doctor of medicine, duly certificated in psychiatry. He has been engaged in the practice of psychiatry for more than 20 years. During all of that time he has been especially interested in the problem of alcoholism. He has treated alcoholics; lectured and written on the subject; and has observed the work of various

institutions in treating alcoholism. Dr. Wade testified that he had observed and interviewed the appellant. He said that appellant has a history of excessive drinking dating back to his early years; that appellant drinks only wine and beer; that "he rarely passes a week without going on an alcoholic binge"; that "his consumption of alcohol is limited only by his finances, and when he is broke he makes an effort to secure alcohol by getting his friends to buy alcohol for him"; that he buys a "fifty cent bottle" of wine, always with the thought that this is all he will drink; but that he ends by drinking all he can buy until he "is passed out in some joint or on the sidewalk." According to Dr. Wade, appellant "has never engaged in any activity that is destructive to society or to anyone except himself." He has never received medical or psychiatric treatment for his drinking problem. He has never been referred to Alcoholics Anonymous, a voluntary association for helping alcoholics, nor has he ever been sent to the State Hospital.

Dr. Wade's conclusion was that "Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage." Although the doctor responded affirmatively to a question as to whether the appellant's taking the first drink on any given occasion is "a voluntary exercise of will," his testimony was that "we must take into account" the fact that chronic alcoholics have a "compulsion" to drink which "while not completely overpowering, is a very strong influence, an exceedingly strong influence," and that this compulsion is coupled with the "firm belief in their mind that they are going to be able to handle it from now on." It was also Dr. Wade's opinion that appellant "has an uncontrollable compulsion to drink" and that he "does not have the will power [to resist the constant excessive consumption of alcohol or to avoid appearing in public when intoxicated] nor has he been

given medical treatment to enable him to develop this will power."

The trial judge in the county court, sitting without a jury, made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." [1]

The court then rejected appellant's constitutional defense, entering the following conclusion of law:

> "(1) The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is

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[1] I do not understand the relevance of our knowing "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem." (Opinion of MARSHALL, J., *ante*, p. ——). We do not "traditionally" sit as a trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid. See pp. 11–15, *infra*.

I confess, too, that I do not understand the relevance of our knowing very little "about alcoholism itself," given what we do know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible. See p. 8–9, *infra*.

not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court found appellant guilty as charged and increased his fine to $50. Appellant did not have the right to appeal further within the Texas judicial system. Tex. Code Crim. Proc. Art. 4.03. He filed a jurisdictional statement in this Court.

I.

The issue posed in this case is a narrow one. There is no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular. This case does not concern the infliction of punishment upon the "social" drinker—or upon anyone other than a "chronic alcoholic" who as the trier of fact here found cannot "resist the constant, excessive consumption of alcohol." Nor does it relate to any offense other than the crime of public intoxication.

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." We must consider whether the Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as "cruel and unusual punishment." This case does not raise any questions as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power

to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

II.

As I shall discuss, consideration of the Eighth Amendment issue in this case requires an understanding of "the disease of chronic alcoholism" with which, as the trial court found, appellant is afflicted, which has destroyed his "will power to resist the constant excessive consumption of alcohol," and which leads him to "appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." It is true, of course, that there is a great deal that remains to be discovered about chronic alcoholism. Although many aspects of the disease remain obscure, there are some hard facts—medical and, especially, legal facts—that are accessible to us and that provide a context in which the instant case may be analyzed. We are similarly woefully deficient in our medical, diagnostic, and therapeutic knowledge of mental disease and the problem of insanity; but few would urge that, because of this, we should totally reject the legal significance of what we do know about these phenomena.

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[2] It is not foreseeable that findings such as those which are decisive here—namely that the defendant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

Alcoholism [3] is a major problem in the United States.[4] In 1956 the American Medical Association for the first time designated alcoholism as a major medical problem and urged that alcoholics be admitted to general hospitals for care.[5] This significant development marked the acceptance among the medical professior of the "disease concept of alcoholism." [6] Although there is some problem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled

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[3] The term has been variously defined. The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

For other common definitions of alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Ann. Am. Acad. Polit. & Soc. Sc. 1, 2 (1958); Diethelm, Etiology of Chronic Alcoholism 4 (1955); Plaut, Alcohol Problems—A Report to the Nation by the Cooperative Commission on the Study of Alcoholism 39 (1967) (hereafter cited as Plaut); Aspects of Alcoholism 9 (1963) (published by Roche Laboratories); The Treatment of Alcoholism—A Study of Programs and Problems 8 (1967) (published by the Joint Information Service of the American Psychiatric Association and the National Association for Mental Health) (hereafter cited as The Treatment of Alcoholism); 2 Cecil & Loeb, A Textbook of Medicine 1620, 1625 (1959).

[4] It ranks among the top four public health problems of the country. Block, Alcoholism—Its Facets and Phases (1962).

[5] American Medical Association: Report of Reference Committee on Medical Education and Hospitals, 162 J. A. M. A. 82 (1956).

[6] See generally Jellinek, The Disease Concept of Alcoholism (1960).

by him. Today most alcohologists and qualified members of the medical profession recognize the validity of this concept. Recent years have seen an intensification of medical interest in the subject.[7] Medical groups have become active in educating the public, medical schools, and physicians in the etiology, diagnosis, and treatment of alcoholism.[8]

Authorities have recognized that a number of factors may contribute to alcoholism. Some studies have pointed to physiological influences, such as vitamin deficiency, hormone imbalance, abnormal metabolism, and hereditary proclivity. Other researchers have found more convincing a psychological approach, emphasizing early environment and underlying conflicts and tensions. Numerous studies have indicated the influence of sociocultural factors. It has been shown, for example, that the incidence of alcoholism among certain ethnic groups is far higher than among others.[9]

The manifestations of alcoholism are reasonably well identified. The late E. M. Jellinek, an eminent alcohologist, has described five discrete types commonly found among American alcoholics.[10] It is well-established that alcohol may be habituating and "can be physically addicting."[11] It has been said that "the main point for the nonprofessional is that alcoholism is not

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[7] See, *e. g.*, Haggard & Jellinek, Alcoholism Explored (1942); Diethelm, Etiology of Chronic Alcoholism (1955); Ullman, To Know the Difference (1960); Pittman & Snyder, Society, Culture, and Drinking Patterns (1962).

[8] See Alcoholism, Public Intoxication and the Law, 2 Col. J. of Law & Soc. Prob. 109, 113 (1966).

[9] See Alcohol and Alcoholism 24–28. "Although many interesting pieces of evidence have been assembled, it is not yet known why a small percentage of those who use alcohol develop a destructive affinity for it." The Treatment of Alcoholism 9.

[10] See Jellinek, The Disease Concept of Alcoholism 35–41 (1960).

[11] Alcoholism 3 (1963) (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare) (here-

within the control of the person involved. He is not willfully drinking." [12]

Although the treatment of alcoholics has been successful in many cases,[13] physicians have been unable to discover any single treatment method that will invariably produce satisfactory results. A recent study of available treatment facilities concludes as follows: [14]

> "Although numerous kinds of therapy and intervention appear to have been effective with various kinds of problem drinkers, the process of matching patient and treatment method is not yet highly developed. There is an urgent need for continued experimentation, for modifying and improving existing treatment methods, for developing new ones, and for careful well-designed evaluative studies. Most of the facilities that provide services for alcoholics have made little, if any, attempt to determine the effectiveness of the total program or of its components."

Present services for alcoholics include state and general hospitals, separate state alcoholism programs, outpatient clinics, community health centers, general practitioners,

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after cited as Alcoholism). See also Bacon, Alcoholics Do Not Drink, in Understanding Alcoholism, 315 Ann. Am. Acad. Polit. & Soc. Sc. 55–64 (1958).

[12] Ullman, To Know the Difference 22 (1960).

[13] In response to the question "can a chronic alcoholic be medically treated and returned to society as a useful citizen?" Dr. Wade testified below as follows:

"We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink."

[14] The Treatment of Alcoholism 13.

and private psychiatric facilities.[15] Self-help organizations, such as Alcoholics Anonymous, also aid in treatment and rehabilitation.[16]

The consequences of treating alcoholics, under the public intoxication laws, as criminals can be identified with more specificity. Public drunkenness is punished as a crime, under a variety of laws and ordinances, in every State of the Union.[17] The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice has reported that "two million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." [18] Drunkenness offenders make up a large percentage of the population in short-term penal institutions.[19] Their arrest and processing place a tremendous burden upon the police, who are called upon to spend a large amount of time in arresting for public intoxication and in appearing at trials for public intoxication, and upon the entire criminal process.[20]

It is not known how many drunkenness offenders are chronic alcoholics, but "there is strong evidence that a large number of those who are arrested have a lengthy history of prior drunkenness arrests." [21] "There are in-

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[15] *Id.*, at 13–26. See also Alcohol and Alcoholism 31–40; Plaut 53–85.

[16] See Ullman, To Know the Difference 173–191 (1960).

[17] For the most part these laws and ordinances, like Article 477 o fthe Texas Penal Code, cover the offense of "being drunk in a public place." See Task Force Report: Drunkenness 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice) (hereafter cited as Task Force Report).

[18] *Ibid.*

[19] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law. & Soc. Prob. 109, 110 (1966).

[20] See Task Force Report 3–4.

[21] *Id.*, at 1.

stances of the same person being arrested as many as 40 times in a single year on charges of drunkenness, and every large urban center can point to cases of individuals appearing before the courts on such charges 125, 150, or even 200 times in the course of a somewhat longer period." [22]

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail back to the street and, eventually, another arrest.[23] The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates.[24]

Finally, most commentators, as well as experienced judges,[25] are in agreement that "there is probably no drearier example of the futility of using penal sanctions

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[22] Allen, The Borderland of Criminal Justice 8 (1964). It does not, of course, necessarily follow from the frequency of his arrests that a person is a chronic alcoholic.

[23] See Pittman & Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958). See also Pittman, Public Intoxication and the Alcoholic Offender in American Society, Appendix A to Task Force Report.

Dr. Wade answered each time in the negative when asked:

"Is a chronic alcoholic going to be rehabilitated by simply confining him in jail without medical attention?

"Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

"Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?"

[24] See, *e. g.*, MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime and Delinquency 15 (1963).

[25] See, *e. g.*, Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

to solve a psychiatric problem than the enforcement of the laws against drunkenness." [26]

> "If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its costs. But the fact is that this activity accomplishes little that is fundamental. No one can seriously suggest that the threat of fines and jail sentences actually deters habitual drunkenness or alcoholic addiction. . . . Nor, despite the heroic efforts being made in a few localities, is there much reason to suppose that any very effective measures of cure and therapy can or will be administered in the jails. But the weary process continues to the detriment of the total performance of the law enforcement function." [27]

III.

It bears emphasis that these data provide only a context for consideration of the instant case. They should not dictate our conclusion. The questions for this Court are not settled by reference to medicine or penology. Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment may be inflicted, and, if so, whether, in the case now before us, those principles preclude the imposition of such punishment.

It is settled that the Federal Constitution places some substantive limitation upon the power of state legislatures to define crimes for which the imposition of punishment is ordered. In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court considered a conviction under a California statute making it a criminal offense

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[26] Guttmacher & Weihofen, Psychiatry and the Law 319 (1952).

[27] Allen, The Borderland of Criminal Justice 8 (1964).

for a person to "be addicted to the use of narcotics." At Robinson's trial, it was developed that the defendant had been a user of narcotics. The trial court instructed the jury that "to be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." 370 U. S., at 662–663.

This Court reversed Robinson's conviction on the ground that punishment under the law in question was cruel and unusual, in violation of the Eighth Amendment of the Constitution as applied to the States through the Fourteenth Amendment. The Court noted that narcotic addiction is considered to be an illness and that California had recognized it as such. It held that the State could not make it a crime for a person to be ill.[28] Although Robinson had been sentenced to only 90 days in prison for his offense, it was beyond the power of the State to prescribe such punishment. As MR. JUSTICE STEWART, speaking for the Court, said: "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U. S., at 667.

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his

[28] "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U. S., at 678 (DOUGLAS, J., concurring).

conviction elected to take narcotics. But the crime as defined did not punish this conduct.[29] The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime comprised of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status.[30] But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found,

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[29] The Court noted in *Robinson* that narcotic addiction "is apparently an illness which may be contracted innocently or involuntarily." 370 U. S., at 667. In the case of alcoholism it is even more likely that the disease may be innocently contracted, since the drinking of alcoholic beverages is a common activity, generally accepted in our society, while the purchasing and taking of drugs are crimes. As in *Robinson*, the State has not argued here that Powell's conviction may be supported by his "voluntary" action in becoming afflicted.

[30] In *Robinson*, we distinguished between punishment for the "status" of addiction and punishment of an "act":

"'The statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addition a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the state, and whether or not he has been guilty of any antisocial behavior there." 370 U. S., at 666.

upon the medical and other relevant testimony, that Powell is a "chronic alcoholic." He defined appellant's "chronic alcoholism" as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.[31]

Article 477 of the Texas Penal Code is specifically directed to the accused's presence while in a state of intoxication, "in any public place, or at any private house except his own." This is the essence of the crime. Ordinarily when the State proves such presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed. But here the findings of the trial judge call into play the principle that a person may not be pun-

[31] I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated. See n. 23, *supra*.

Finally, contrary to the views of MR. JUSTICE WHITE, *ante*, p. 4, I believe these findings must fairly be read to encompass the facts that my Brother WHITE agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness" and "avoiding public places when intoxicated" on the occasion in question were "impossible." Accordingly, in MR. JUSTICE WHITE's words, "[the] statute is in effect a law which bans a single act, for which [he] may not be convicted under the Eighth Amendment—the act of getting drunk." In my judgment, the findings amply show that "it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion at issue."

ished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*. It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1688 were initially directed to the type and degree of punishment inflicted.[32] But in *Robinson* we recognized that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." 370 U. S., at 676 (MR. JUSTICE DOUGLAS, concurring).[33]

The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a compulsion" which is part of his condition.

I would reverse the judgment below.

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[32] See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910). See generally, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636–645 (1966).

[33] Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in two circuits. See *Easter* v. *District of Columbia*, 361 F. 2d 50 (C. A. D. C. Cir. 1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).